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CASES
IN THE
COURT OF COMMON PLE

AND
EXCHEQUER CHAMBER.

BY
JOHN SCOTT,
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. II.

TRINITY, MICHAELMAS, AND HILARY TERMS, 5 & 6 WILL

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JUDGES
OF
THE COURT OF COMMON PLEAS.

The Right Hon. Sir NICOLAS CONYNGHAM TINDAL, Knt., L. C. J.

The Hon. Sir JAMES ALLAN PARK, Knt.

The Hon. Sir STEPHEN GASELEE, Knt.

The Right Hon. Sir JOHN VAUGHAN, Knt.

The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.

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ERRATA.

Page 134, Note, line 5, dele "was."

207, Marginal note, line 16, after "maintained," add "against the defendant."

423, Marginal note, lines 15, 16, for "defendant" read "plaintiff."

859, Line 23, for page "704" read "794."

871, — 37, for "105" read "113."

In the House of Lords.

EASTER VACATION, 5 WILL. IV.

ANDREWS v. DREVER and Others.

1835.

Thursday,
May 21st.

THIS was an action of debt, brought by the plaintiffs below (the defendants in error) against the defendant below (the plaintiff in error), upon the statute 2 & 3 Edward 3, for not setting out tithe of hay. The declaration stated that the plaintiffs below were proprietors of the tithes of corn, grain, and hay of certain lands in the parish of Prestbury, in the county of Chester, and that the defendant below was occupier of the same lands. It then set forth the subtraction of the tithe by the defendant, and claimed the treble value. The defendant pleaded nil debet. The plaintiffs' particular of demand stated that the action was brought to recover the value (single or treble) of the tithe of about twenty acres of hay, for six years commencing with 1825, and amounting to 35*l.* 5*s.* in the whole.

The mere non-payment of tithes is not a sufficient answer to a claim of tithes made by a lay impropriator.

The cause was tried at the Summer Assizes for the county of Chester, in the year 1831, before Mr. Baron Bolland, when a verdict was found for the plaintiffs below, for 105*l.* 15*s.*, being the treble value of the tithes mentioned in the particular, for which sum judgment was entered up. At the trial a bill of exceptions was tendered to the learned judge, and duly sealed, and error was

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brought thereupon into the Exchequer Chamber, when the judgment of the court below was affirmed—*Bayley v. Drever*, 1 Ad. & E. 449, 3 N. & M. 885. The defendant below now brought a writ of error returnable in parliament.

The bill of exceptions set forth, that, in support of the plaintiffs' case, there were given in evidence—First, certain letters patent of Queen Elizabeth, dated the 19th November, 1579, granting to divers persons, one of whom was Thomas Leigh, amongst other things “the tithes, portions, and oblations issuing &c. out of the vill, fields, parish, or hamlets of Prestbury, and also all the rectory and church of Prestbury (which said rectory and premises to the monastery of St. Werburg did theretofore belong and pertain), and all manors, glebes, tithes, obventions, &c. situate &c. in the vill, fields, parish, or hamlets of Prestbury or elsewhere in the county of Chester, belonging to the said rectory, or reputed as parcel thereof.” Secondly—a deed of partition dated the 1st October, 1586, whereby the other grantees conveyed to Thomas Leigh the said manor and church of Prestbury, with all its appurtenances. Thirdly—certain leases and counterparts of leases of tithes (comprehending every species of tithe and obvention) arising within the township of Woodford, in the parish of Prestbury (within which township the lands of the defendant in respect of which the tithe was claimed were situated), purporting to have been granted by different members of the family of Leigh for terms of years long since expired; the earliest of which bore date the 12th June, 1710, and the latest the 16th October, 1798, upon certain of which leases the receipt of rent was duly proved. Fourthly—similar leases of tithes arising in other townships of the same parish, from the 11th November, 1686, to the 16th of October, 1798, purporting to have been granted in like manner by the family of Leigh; as to some of which also payment of the rent reserved thereon was duly proved. The admission of these leases was objected

to on the part of the defendant below: they were, however, received. The bill of exceptions then set forth the parol evidence given in the cause; from which it appeared that the plaintiffs below were the lay impropiators of tithes in the township of Woodford, in the parish of Prestbury: but there was no evidence of tithe of hay having ever been received for or in respect of the land occupied by the defendant below in that township, with the exception of a payment of five shillings for a tithe of hay alleged to have been paid by the person who had occupied the farm before him, and which payment was made after the payment of tithe of hay had been disputed.

The learned judge told the jury, that mere nonpayment of tithe was no answer to a claim of the tithe by a lay impropiator; that it was clear it was no answer even to a claim of a lay rector; and that the jury could not presume a grant from mere nonpayment of tithes; that, from the evidence of the grant from the crown in 1579, and the evidence of modern enjoyment of tithes by them, the jury might presume in favour of the plaintiffs intermediate conveyances of the rectory between that time and the year 1686, the date of the first lease produced; that the perception of the tithe of corn by the plaintiffs was evidence of a title in the plaintiffs to the tithe of hay; that the tithe of hay followed that of corn, unless shewn to be severed by some grant or conveyance; and that the leases and counterparts of leases, as well of tithes within the township of Woodford as of tithes within other townships in the same parish, were good and admissible evidence for the purpose of rebutting the presumption of a grant, which it was contended on the part of the defendant arose from the nonpayment of the tithe of hay. To this direction the counsel for the defendant excepted.

Sir F. Pollock and *Mr. John Jervis*, for the defendants below.—As against a lay impropiator, a grant or release

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of the tithe may and ought to be presumed from long continued nonpayment, upon the acknowledged principle that a legal origin may be inferred from long undisputed enjoyment. Although there are authorities which seem to bear out the proposition that no distinction exists in this respect between a lay and a spiritual rector, and that mere nonpayment of tithes, however remotely carried back, furnishes no answer to the claim of either, yet these authorities when examined will be found to rest on no sure foundation. They proceed on the assumption that the claim founded on nonpayment, as evidencing a lost grant, is in substance and effect a claim of prescriptive exemption from tithe altogether, which it is admitted cannot prevail against either a spiritual rector or a lay impropriator. But the two cases are essentially distinct, the one being a claim which is inconsistent with the nature and origin of the property, the other being in no respect inconsistent with either, and being at the same time in strict accordance with the rules of law as applied to every other description of property having similar qualities. Before the dissolution of monasteries the property of the church could not be granted away from the church, and no layman could plead an entire exemption from the payment of tithes. There could therefore be no prescriptive title in a layman, whether arising from grant or from release. But when, after the dissolution, a portion of the church property came into the hands of laymen, the nature and character of that property were altered: it acquired the qualities of lay property generally, and became susceptible of every modification of which lay property admitted. There is nothing, therefore, unreasonable in the supposition that the whole or a portion of the tithes of a rectory may have been granted away either in perpetuity or for a term; or, what is substantially the same proposition, that an individual proprietor of lands subject to tithes, or the whole of such proprietors within a given district, should for an

adequate consideration have purchased a release from the payment of the whole or some particular species of title. In the contrary doctrine, on the other hand, there is this anomaly, namely, that time, which gives stability to every other description of property, impairs the security of this, by destroying the evidence of title on which it is founded, without affording any equivalent protection from the length of enjoyment. That doctrine, so entirely at variance with the principles of law, and so destitute of equitable foundation, has many times been questioned and condemned by distinguished legal authorities; among others, by Mr. Baron Clarke in *Fanshaw v. More*, 2 Eagle & Y. 72, by Lord Rosslyn in *Rose v. Calland*, 2 E. & Y. 485, by Mr. Baron Wood in *Neade v. Norbury*, 3 E. & Y. 746, and by Lord Redesdale in the same case on appeal to the House of Lords. Lord Talbot and Lord Hardwicke are also stated by Lord Eldon to have struggled, though ineffectually, against the doctrine—see *Berney v. Harvey*, 2 E. & Y. 385.

There was no evidence of title in the plaintiffs below to the tithe of hay. It does not appear in what character or by what right they claimed the tithe: the title to it was shewn to be, up to the year 1832, in the family of Leigh; and there was no proof that the plaintiffs were in any way connected with or derived any title from that family. The mere perception of the tithe of corn for a short period before the commencement of the action, furnishes no ground for inferring a title to the hay tithe, inasmuch as it was competent to the rector to make a lease of the tithe of corn only, retaining the rest to himself. It was consistent, therefore, with the case proved by the plaintiffs, that they might be lessees of the tithe of corn, without having any right to the tithe of hay.

If the presumption of a grant of nonpayment of tithe be held admissible, the leases and counterparts given in evidence by the plaintiffs below could not be received to re-

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but that presumption, because it is perfectly consistent to suppose a grant or release of the tithe to an individual proprietor of land, or to the proprietors generally of the lands comprised within a particular district, and that the rest of the lands in the same parish should still remain subject to the original burthen.

The Attorney General and *Mr. Temple*, for the plaintiffs below, relied upon the rule received both in the courts of law and of equity, warranted by a long and uniform series of decisions, that the mere nonpayment of tithes is no answer to a claim made by a lay impropriator.

The following question was submitted for the opinion of the judges (a):—

“Whether the mere nonpayment of tithes is a sufficient answer to a claim of tithes made by a lay impropriator.”

Lord Chief Justice TINDAL now delivered the opinion of the judges:—

The unanimous opinion of my learned brothers and myself is, that the mere nonpayment of the tithes is not a sufficient answer to a claim of tithes made by a lay impropriator. That there can be no prescription in non decimando against a lay impropriator, is a principle of law so thoroughly settled that it can admit of no doubt. The only legal ground, therefore, on which the non-pernancy of tithes can be set up as an answer to a claim of tithes, is, that it affords the presumption of a grant of tithes made by the lay impropriator to the terre-tenant. So far as the authorities have been brought before your lordships, not a single instance can be found in which there has been a

(a) The judges present at the argument were—Lord Chief Justice Tindal, Mr. Justice Park, Mr. Justice Littleale, Mr. Justice Gaselee,

Mr. Baron Parke, Mr. Baron Bolland, Mr. Justice Patteson, Mr. Baron Gurney, Mr. Justice Williams, and Mr. Justice Coleridge.

presumption of a grant from the lay rector, where there has not been some positive evidence, something more than the mere nonperception of tithes from all time, as the foundation of such a presumption. The course of authorities is uniform in this respect, so as to render it unnecessary for us to enter into that discussion. But the question put by your lordships is comprised in terms merely negative, that there has been no perception of tithes by the lay rector at any period—no positive or affirmative ground is suggested—no separation of any one species of tithes from the rest; no description in any way of the deed which forms the muniment of the title to the land, by which the land itself is stated to be tithe free; no instance suggested in which the tithes have been treated as property by the owner of the land, either in family settlements or in conveyances from one hand to another, or in leases from the owners of the tithes: in all which cases there would have been a positive dealing with the tithes as a substantive property separate and distinct from the land, and in which the enjoyment of that property by the nonperception by the lay rector would have gone along, and have been consistent, with the documentary evidence. In these supposed cases, nothing would have been wanting but the production of the original grant of the tithes from the lay rector to the terre-tenant; and the want of such original grant might well be supplied by the presumption that it once existed, and was lost by time and accident, on the ordinary grounds on which such presumptions are made: but the presumption in this case, if made at all, must be grounded on the mere nonperception, and nothing else. We are, however, unable to see how far the presumption resting on such negative grounds alone can be distinguished, either in principle or effect, as a prescription in non decimando. In both cases, the evidence, and the only evidence, must be, the right of the rector on the general law of the land, the occupation of titheable land

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by the terre-tenant, and the nonperception of tithes arising from the land in the earliest times by the rector. The claim on the part of the land-owner is precisely the same, whether set up as a prescription in non decimando, or the presumption of a grant: it is in both cases a claim that the land is to be held free from the payment of tithes. If therefore such a state of facts can be held to support the presumption contended for, it would necessarily follow that in every case the nonpayment of tithe would have the full effect of a prescription in non decimando, though such a prescription is admitted not to be valid at law. Upon these short grounds, we have come to the conclusion which I have already stated to your lordships.

Lord LYNDEHURST and Lord BROUGHAM expressed their concurrence in the above opinion, and the judgment of the court below was accordingly affirmed.

Judgment affirmed.

In the Exchequer Chamber.

EASTER VACATION, 5 WILL. IV.

DOE d. BARRETT v. KEMP.

1835.

Tuesday,
June 9th.

THIS was an action of ejectment, in which the question was whether a slip of land between some antient inclosures and the highway belonged to the owner of the adjoining freehold, or to the lord of the manor. At the trial before Mr. Justice Littledale at the Summer Assizes at Norwich, in the year 1830, it appeared, that, in 1806, one Lingford had inclosed a slip of waste land lying between the high road and an old inclosure in the parish of Gissing belonging to Lord Orford; that Lingford built thereon the two cottages to recover which this action was brought, and mortgaged the same to the father of the lessor of the plaintiff, who devised them to the latter. It further appeared that the highway was skirted on either side by slips of waste land from the spot on which the cottages were erected, for several hundred yards, up to a bridge, where the old inclosures converged to the sides of the road, and the wastes terminated in a point; that, a few yards beyond the bridge, the old inclosures again receded, and the road was again skirted by waste land; that, with the exception of the inclosed land belonging to Lord Orford, between which and the high road the cottages in question were built, the old inclosed land on both sides of the road from the cottages

In ejectment, the question was whether a slip of land between some antient inclosures and a highway belonged to the owner of the adjoining land, or to the lord of the manor:—Held, that acts of ownership by the lord (grants of licenses to inclose) over slips skirting the same road, the continuity of which was only broken by a bridge and some antient tenements, were admissible in evidence.

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to within a few yards of the bridge, belonged to the defendant, who was lord of the manor; and that beyond the bridge the old inclosed land on either side of the road belonged to different proprietors. The defendant proved various acts of ownership on the wastes by the road side from the cottages to the bridge, and proposed to call witnesses to prove like acts of ownership on wastes similarly situated in other parts of the manor. The learned judge refused to admit this evidence. A verdict having been found for the lessor of the plaintiff, a new trial was afterwards directed by the court of Common Pleas, on the ground that the evidence tendered had been improperly rejected. Upon the second trial, Lord Lyndhurst admitted the evidence that had on the former occasion been rejected. This evidence consisted of licenses granted by the defendant as lord of the manor, at a manor court, to persons of the names of Clarke, Bolton, and Gilbert, for the inclosure of land adjoining the same highway, but at the distance of about two miles from the locus in quo, and not adjoining the defendant's freehold; and also of licenses to other persons, named Hunt, Harrison, and Spurden, for the inclosure of wastes described generally as being waste lands within the manor.

A bill of exceptions to the reception of this evidence was tendered. A verdict having been found for the defendant, the bill of exceptions was brought by writ of error before the court of Exchequer Chamber, and was on a former day argued by—

Sir *W Follett*, for the lessor of the plaintiff, and Mr. *Andrews*, for the defendant.

Cur. adv. vult.

Lord Chief Justice DENMAN now delivered the unanimous opinion of the court:—

This is an ejectment brought to recover possession of two cottages in the parish of Gissing, in the county of

Norfolk, built on a small piece of land lying between the high road and an old inclosure belonging to Lord Orford, which was inclosed by a person of the name of Lingfood, in the year 1806, mortgaged by him to the father of the lessor of the plaintiff in 1809, and one of the cottages built by him in the year 1806, and the other in 1815. The defendant, who is the lord of the manor, has possessed himself of these cottages, alleging that they were built on the waste of the manor. It is contended, on the part of the lessor of the plaintiff, that the land belonged to the Earl of Orford, being a small slip between the inclosed land of Lord Orford and the highway, on the general presumption that land so situated belongs to the owner of the inclosed land in front of which it is so situated. The cause has been twice tried—the first time before Mr. Justice Littledale, when a verdict was found for the lessor of the plaintiff. The court of Common Pleas granted a new trial, on the rejection of evidence. It was tried a second time before Lord Lyndhurst, and a verdict found for the defendant: but a bill of exceptions was tendered to some of the evidence which his lordship received for the defendant. The case in the court of Common Pleas is reported in 7 Bing. 332, and 5 M. & P. 173.

For the purpose of making out the title of the defendant upon the first trial, these facts are reported in Bingham to have been established:—That the road was skirted on both sides by slips of green or waste land from these cottages, for several hundred yards, nearly up to a bridge where the old inclosure converged to the sides of the road, and the greens terminated in a point; that a few yards beyond the bridge the fences of the old inclosures receded again, and the road was again skirted by greens of the same description, which ultimately terminated in a large common; that, with the exception of the piece of land belonging to Lord Orford, between which and the high road the cottages in question were built, the old inclosed

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land on both sides of the road from the cottages in question to within a few yards of the bridge belonged to the defendant. The defendant, in order to support his claim, shewed various acts of ownership exercised by him from time to time on the greens or waste lands by the sides of the road from the cottages in question up to the bridge; and then proposed to shew similar acts of ownership on the greens and wastes beyond the bridge and in various other parts of the manor. The learned judge, however, refused to admit evidence of those acts beyond the bridge, the defendant being no further the owner of the adjoining inclosed lands: and conflicting evidence of acts of ownership over the spot in question by Lord Orford and those under whom the lessor of the plaintiff claimed, being adduced on the part of the latter, a verdict was found for him. The court of Common Pleas were of opinion that the evidence ought to have been received, and granted a new trial.

It is to be observed that the evidence rejected consisted of two parts—first, the acts done on slips of green on the road beyond the bridge, which is the continuation of the road on which the locus in quo was situated—secondly, the acts done in other parts of the manor.

The second trial took place before Lord Lyndhurst; and, upon that occasion, evidence upon both these heads was offered and received, and a bill of exceptions was tendered, which has been argued before Lord Denman, Mr. Justice Littledale, Mr. Baron Parke, Mr. Baron Bolland, Mr. Justice Patteson, Mr. Baron Gurney, and Mr. Justice Williams. The evidence consisted of grants or licenses to inclose, made by the defendant, the lord of the manor, at the manor court, to six different persons—to Clarke, Bolton, and Gilbert, where the pieces of ground were described as situate in Long Row Road, which is the road before mentioned as beyond the bridge, and distant two miles from the locus in quo—three other grants, to

Hunt, Harrison, and Spurden, in which there is no description of their locality; they are merely called waste land, and are situated within the manor. As to all the six, it was in evidence that they were lying between the land of other persons and the highway. It appears from the plan produced at the trial, which has been annexed to the bill of exceptions, that a space of sixty or seventy yards between the cottages in question and the bridge is occupied by houses, which are described as old houses. It is not stated in the evidence reported in this case, as on the first trial, that the road by the sides of which the slips are situated terminated in a large common. The question for our consideration is, whether all these grants of permission to inclose were admissible in evidence. These grants were, we apprehend, the acts of ownership which were offered in evidence on the first trial, and rejected, and for the rejection of which the court of Common Pleas granted the new trial; they being of opinion, as would seem from the report, that all of them ought to have been received. The ground upon which it has been contended by the counsel for the defendant that they are admissible in evidence, is, that there was an unity of ownership and an unity of character between the locus in quo and the several pieces of land which were comprised in those grants. That adjoining to the locus in quo an inclosure had been made by a person of the name of Start, on a slip in front of the defendant's own land, between that and the road, under a grant by the defendant as lord of the manor, that grant reserving a small rent, and the piece being therein called "Pound Green." That, in continuity (though not in unbroken contiguity, because the bridge and the old houses intervene) there are slips of green for a very considerable distance, more than two miles, upon various parts of which the lord of the manor has exercised acts of ownership; and that this affords strong presumption that the lord of the manor is the owner of all these slips of land. Further,

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that the three other pieces of land for the inclosure of which grants of licenses were made to Hunt, Harrison, and Spurden, being pieces of waste alleged to be lying between the lands of private individuals and the high road, there is in them an unity of character which will make these acts of ownership receivable in evidence. The judgment of the court of Common Pleas appears to authorize the reception of all these grants in evidence: but the opinion of the court seems to have been given upon the supposition that all the pieces of waste with respect to which evidence was given, lay on the sides of a road or roads terminating in a large common, which, upon this bill of exceptions we cannot assume. Upon the whole of the case, we think that there is a sufficient foundation laid to render the first three of the above-mentioned grants admissible, upon the ground that they are grants of parcels of one and the same waste or common lying on both sides of the road, although the continuity of the waste is interrupted for a short distance by the intervention of the houses by the sides of the road.

It then remains to be considered whether the other three grants, to Hunt, Harrison, and Spurden, were admissible; and we are of opinion that they are not, even conceding that they were grants of parts of the waste lying between a high road and the lands of private persons. All that these three grants shew, is, that, in some parts of this manor, the lord has exercised acts of ownership over pieces of land which are denominated waste; but there is no proof whatever where these pieces were situate: they might have been many miles from the spot in question, wholly unconnected with it—parcels of large wastes the soil of which was the undoubted property of the lord of the manor. The only unity of character between these parcels and the spot in dispute, is, that they lie within the same manor, and between private inclosures and a public road: but we think there is not a sufficient

foundation to let in evidence of acts of ownership over one of such parcels as proof of title to others. If the lord has a right to one piece of waste land, it affords no inference, even the most remote, that he has a right to another in the same manor, although both may be similarly situated with respect to the highway. Assuming that all were originally the property of the same person as lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises, from his retaining one part in his hands, that he retained another; nor, if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining lands to private individuals, does it by any means follow, or does it raise any probability, that in another part he may not have granted the whole out to private individuals, and they afterwards dedicated part as a public road. But the case is very different with respect to those parcels which from their local situation may be deemed parts of one waste or common; acts of ownership in one part of the same field are evidence of title to the whole: and the like may be said of similar acts over part of one large waste or common.

Upon the whole, therefore, we are of opinion that the bill of exceptions must prevail, and that there must be a *venire de novo*.

Venire de novo.

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1835.

Saturday,
May 23rd.

GWYNNE v. BURNELL and Another.

By the statute 43 Geo. 3, c. 99, s. 13, the district collectors of assessed taxes are required to give security to any two or more of the commissioners of taxes, for their duly paying such monies as shall come to their hands: and by 3 Geo. 4, c. 88, s. 2, reg. 1, art. 8, it is provided that "all bonds, contracts, and securities to be entered into with or taken from the receiver-general to be appointed,

or with or from any other person or persons to be appointed under that act, and their respective sureties, to remit the monies arising by the taxes granted by the said acts (the acts relating to the assessed taxes), or any of them, or any other duties or sums of money under the management of the commissioners for the affairs of taxes, shall be to his majesty, his heirs, and successors:"—Held, that a bond given by a collector and his sureties under the former act, was properly given to the commissioners; and that the bond was good notwithstanding it was conditioned to pay the monies collected to the receiver-general, and also to the commissioners, though by the 43 Geo. 3, c. 99, and the 3 Geo. 4, c. 88, the collectors are required to pay over such monies to the receiver-general only.

Held also, that payment by the collector to the receiver-general of monies received by him to the account of a different year from that for the service of which they were collected (in order to make up deficiencies in a preceding year's account), was a breach of the condition of the bond for duly paying over the sums collected.

The 13th section of the 43 Geo. 3, c. 99, contains a proviso "that no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector or collectors, in pursuance and by virtue of the directions and powers given to the respective commissioners by the act:"—Held (on error in the Exchequer Chamber), that the sale of the lands and goods of the collector was a condition precedent to the commencement of an action against the surety on the bond—Lord Abinger and Mr. Baron Parke dissenting.

Held also, that, to make such sale a condition precedent, the surety is bound to aver and to prove notice to the commissioners, or at all events knowledge in them, of the existence of the lands and goods—Lord Denman and Mr. Justice Williams dissenting.

The bond was conditioned for payment to the receiver-general of the sums collected upon the days and at the times appointed by the acts. No times are in fact appointed by the acts; but the receiver-general is empowered to appoint the times. There was no averment in the pleadings that any times were appointed: but, the defendant having pleaded general performance, and one of the breaches in the replication being that the collector did not pay to the receiver-general the monies collected at the times by the acts appointed, on which there was a special finding, that he did:—Held, that it must be presumed that the receiver-general had appointed some times of payment.

THIS was an action of debt on a bond entered into by the defendant as surety for one Richard Bigg, a collector of assessed taxes for the year 1828, ending in 1829. The trial took place before Mr. Justice Alderson, at the Sittings at Guildhall after Trinity Term, 1831, when a verdict was found for the defendant below (the plaintiff in error), with leave to the plaintiffs below to move that that verdict might be set aside, and a verdict entered for them for the penalty of the bond, and nominal damages for the detention of the debt, together with the sum of 693*l.*, or such part of that sum as the court might think them entitled to, as damages for the breaches of the condition of the bond, in Bigg's not *duly* paying over to the receiver-general the monies collected by him for the above year. The plaintiffs below accordingly moved to have the verdict

entered for them; when it was ordered by the court, with the consent of the counsel on both sides, that the final entry of the verdict and judgment should abide the opinion of the court upon a special case, of which the following is all that is material to the present inquiry:—

The plaintiffs declared upon the bond, which was dated the 27th August, 1828, as having been entered into by the defendant with Richard Bigg and one Samuel Cardoza, jointly and severally, to the plaintiffs below, as three of the commissioners under the land-tax and assessed-tax acts for the Tower division, within the county of Middlesex, in the penal sum of 4,048*l*. To this declaration the defendant below pleaded—First, non est factum, after craving oyer of the bond, the condition of which was set out as follows:—“Whereas the above-bounden R. Bigg hath been duly nominated and appointed by the commissioners appointed for putting in execution the said acts of parliament within the said division and county, one of the collectors of the rates and duties above mentioned, rated, laid, and assessed upon the parish of St. Matthew, Bethnal Green, in the Tower division, and county of Middlesex aforesaid, for the year 1828, ending respectively the 25th March and the 5th April, 1829. Now, the condition of this obligation is such, that, if the above-bounden R. Bigg do and shall well and faithfully demand and collect all and every the sum and sums of money in the said assessments charged and specified, of the respective persons from whom the same shall or may be payable, and shall and do, in case of non-payment thereof, duly enforce the powers of the said acts against such persons who may make default therein; and also well and truly pay or cause to be paid unto the receiver-general of the said taxes, rates, and duties for the said county of Middlesex, all such sum and sums of money as shall come to the hands of the said R. Bigg as such collector, upon the days and at the times by the said acts appointed for the payment thereof, and

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according to the true intent and meaning of the said acts; and also do and shall, when thereunto required, at such times and places as shall be appointed for that purpose, give and render, or cause to be given and rendered, unto the commissioners appointed or to be appointed to put the said acts in execution, or any two of them, a just and true account in writing of all such sum and sums of money which he the said R. Bigg shall have collected and received by virtue or on account of the said assessments, and shall forthwith pay and deliver the same unto the said commissioners, or any two of them, or unto such person or persons whom they or any two or more shall appoint: then this obligation to be void; or else to remain in full force and effect."

The execution of the bond was admitted at the trial, subject to two questions reserved by the learned judge—first, as to the necessity of a stamp (*a*)—secondly, whether the bond was valid, not being made to his majesty, his heirs and successors, pursuant to the statutes, particularly the 3 Geo. 4, c. 88, s. 2, reg. 1, art. 8.

The second plea was a general plea of performance of the condition of the bond; on which the plaintiffs below in their replication assigned several breaches, the third of which was, that Bigg had not duly paid over to the receiver-general the monies received by him as collector of the assessed-taxes for the said division, in respect of the rates and assessments mentioned in the condition, viz. for the year 1828-9. On this issue was taken by the defendant below in his rejoinder.

The issues on the third and fourth pleas, that the bond was invalid on the ground of supposed fraud and misrepresentation—on the ninth, that Bigg was not duly nominated to act as collector—on the tenth, that the commissioners had not delivered to Bigg duplicate assessments,

(*a*) Which was negatived by the court below, and not now contested.

with a warrant for collecting them—on the twelfth, that Bigg had absconded to avoid the payment of the arrears due—were all found for the plaintiffs below (b).

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Fifth plea.

The fifth plea stated that Bigg did demand and collect all the assessments; and that, from that time to the time of exhibiting the bill, he had lands, goods, and chattels within the jurisdiction of the commissioners, of which they had notice, and which might have been seized and sold by them, but which they neglected to sell. Replication—that Bigg did not faithfully demand and collect all the assessments; that he had no lands within their jurisdiction which the commissioners could seize and sell, of which they had notice; and that all the goods and chattels of Bigg within their jurisdiction, and of which they had notice, were seized and sold, and were inadequate to the satisfying the deficiencies of Bigg. Rejoinder—that, after the receipt of large sums of money by Bigg, and his omission to pay the same to the receiver-general, Bigg had lands within the jurisdiction of the commissioners which they might have seized and sold, but that they neglected so to do. Issue.

Replication.

Rejoinder.

The sixth plea was similar to the fifth, only leaving out the mention of *lands*, and stating that Bigg had goods after default in payment of the monies collected, of which the commissioners had notice. Replication—that the commissioners did seize all the goods and chattels of which Bigg was possessed within their jurisdiction, and of which they had notice, which, as before alleged, were insufficient to satisfy the deficiencies of Bigg. Rejoinder—that the commissioners did not seize and sell all the goods and chattels of Bigg within their jurisdiction, in manner as the plaintiffs had in their replication alleged. Issue.

Sixth Plea.

Replication.

Rejoinder.

(b) The plaintiffs below had previously obtained judgment on demurrer to the last two pleas. See Collins v. Gwynne, 5 M. & P. 276, 7 Bing. 423.

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Seventh Plea.

Replication.

Rejoinder.

Eighth plea.

Replication.

Rejoinder.

The seventh plea stated, that, after Bigg made default, he had goods and chattels within the jurisdiction of the commissioners, which they might have seized and sold, and which would have been sufficient to satisfy all Bigg's deficiencies, but which they neglected to do, as also to imprison Bigg himself; and that no receiver-general or deputy receiver did or would call upon Bigg to make payment of all sums received by him. Replication—that the commissioners did seize and sell all the goods and chattels of which Bigg was possessed within their jurisdiction, and that the same were insufficient to satisfy his deficiencies; and that the receiver-general of the rates, duties, and assessments for the county of Middlesex did call upon Bigg as such collector to make payment of all sums received by him of the said duties; and that Bigg fled and absconded to places to the receiver-general, deputy receiver-general, and the commissioners unknown, to prevent their imprisoning him. Rejoinder—that the receiver-general did not call upon Bigg as such collector to make payment of all sums of money received by him of the said duties, nor did Bigg before they could have imprisoned him abscond and fly to places to the receiver-general, deputy receiver-general, and the commissioners unknown, in manner as the plaintiffs had in their replication alleged. Issue.

The eighth plea stated that the commissioners did not, at the times in the statute mentioned, call before them the said Bigg, and examine him upon oath or affirmation, and assure themselves of the sums paid to him as such collector, or make any order thereon for the payment of the same to the receiver-general. Replication—that the commissioners did call before them and examine Bigg, the collector, upon oath or affirmation, and assure themselves of the sums paid to Bigg, and did make order thereon for the payment of the same to the receiver-general, on the day and time appointed for receiving the same. Rejoinder—

that the commissioners did not at the times mentioned in the replication, and as often as was necessary, call before them the said Bigg, and examine him upon oath or affirmation, and assure themselves of the sum or sums of money paid to Bigg as such collector, nor make any order therein for payment of the same to the receiver-general. Issue.

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The eleventh plea stated, that, although a large sum of money came to the hands of Bigg, the receiver-general did not call upon and hasten him to make payment of the same upon the days and at the times in the said acts provided and appointed. Replication—that the receiver-general did call upon and hasten Bigg to make such payment upon the days and at the times in the said acts provided and appointed: whereupon issue was joined.

Eleventh plea.

Replication.

The material issues for the consideration of the court were—First, whether Bigg had duly paid to the receiver-general all such sums as had been collected by Bigg, according to the true intent and meaning of the assessed-tax acts, for the year 1828-9—Secondly, whether Bigg had lands which the commissioners could have seized and sold under the 43 Geo. 3, c. 99, s. 52.—Thirdly, whether Bigg had goods which the commissioners could have seized and sold.—Fourthly, whether the commissioners had examined Bigg on oath as to the sums which he had collected, and made any order for the payment of the same to the receiver-general, according to the 39th section of the 43 Geo. 3, c. 99.—Fifthly, whether the receiver-general did call upon and hasten Bigg to make such payment upon the days and times by the said acts in that case made, provided, and appointed for the same.

Upon the first of these issues, the jury found that Bigg had paid over to the receiver-general all the sums received by him for assessments for the year 1828-9; but that he did not pay in all those sums to the service of that year, the sum of 2340*l.* only having been paid by Bigg to the service of that year, and 693*l.*, the residue of the sums so

Finding of the jury.

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That Bigg had
 lands of the
 value of 121*l*.,

and goods of the
 value of 200*l*.,

that the com-
 missioners had
 no notice of the
 fact, but had
 reasonable
 grounds for be-
 lieving that he
 had the goods.

received, having been expressly paid by him to the service of former years during which he had also been collector; but the defendant below had not been his surety during those years. It appeared in evidence that this sum had accordingly been passed to the credit of Bigg's account of those former years, and a receipt given for the amount of those years his account for which was completely paid up. Upon the second and third of these issues, the jury found that Bigg had lands or houses, after his alleged default in paying the last-mentioned sum, of the value of 121*l*., which could have been seized and sold by the commissioners under the 43 Geo. 3, c. 99, s. 52; and that he had goods, after such default, of the value of 200*l*., which could have been seized and sold by the commissioners; and that the commissioners had not notice that Bigg was possessed of any houses, lands, or goods, at the time of his default: the jury however found that the commissioners had reasonable grounds for believing that he possessed household goods at that time of the value of 200*l*., which might have been seized and sold.

The third and fourth of the above issues were found for the defendant; and the question on that part of the case was whether the defendant's eighth and eleventh pleas were good or bad in point of law, after verdict.

The question for the opinion of the court below was, whether a verdict should be finally entered for the plaintiffs for the penalty of the bond and nominal damages, and also for the said sum of 693*l*., or any and what part of that sum, as damages for the third breach assigned in the replication to the second plea; or whether the defendant was entitled to have a verdict entered for him on the issue taken on the third breach, or to judgment on his fifth, sixth, seventh, eighth, or eleventh pleas, or a nonsuit.

Upon this special case, the court of Common Pleas decided, amongst other things not now in question, that the eighth and eleventh pleas were bad in law, inasmuch as

the allegations in those pleas respectively did not amount to a discharge of the defendant from the performance of the condition of the bond, but merely shewed a neglect on the part of the commissioners and the receiver-general in the performance of their duties; that the payment by Bigg to the receiver-general of all the sums received by him for assessments for the year 1828-9, but the not paying in all these sums to the service of that year, but, on the contrary, the paying in of 693*l*. part thereof expressly to the service of former years during which he had been collector, was not a "duly paying over to the receiver-general," within the meaning of the condition of the bond; that the sale of the collector's lands and goods could only form a condition precedent to the right to put the bond in suit against the surety, where the existence of such property of the collector was known to the commissioners at the time of commencing the action; and that the subsequent finding of the jury, that the commissioners had reasonable grounds for believing that the collector had household goods, did not supply the want of actual notice or knowledge. Judgment was accordingly entered for the plaintiffs, with an assessment of damages to the amount of 693*l*. upon the breach of the condition thirdly assigned in the replication to the second plea. The special case was afterwards, by consent, turned into a special verdict, and now came on writ of error into this court.

Sir *W. Follett*, for the plaintiff in error, contended—*First*, that the bond should have been taken in the name of his majesty, his heirs and successors, and proceeded upon accordingly.—*Secondly*, that the condition of the bond was not to the effect required by the statutes 43 Geo. 3, c. 99, and 3 Geo. 4, c. 88.—*Thirdly*, that the bond and condition were void for uncertainty, Bigg the collector in one part of the condition being required to pay over the monies coming to his hands to the receiver-general, and by

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another part of the condition being bound when required to account for and pay over the monies collected on account of the assessments *to the commissioners*, or any two of them, or such person as they should appoint; that the latter part of the condition was illegal, the collectors being required by the said statutes of 43 Geo. 3, c. 99, and 3 Geo. 4, c. 88, to pay over the monies collected to the receiver-general, under a penalty.—*Fourthly*, that the third breach of the condition assigned in the replication to the second plea did not state, nor did it appear on any part of the record, that any days or times were appointed for the payment of the monies collected; and that, as the collectors were by the said acts required to pay the monies collected to the receiver-general at such times as should be appointed, the appointment of such times was a condition precedent to such payment by the collector: that it did not appear that the receiver-general attended at any place (whereof Bigg had notice) to receive the monies collected—see the 3 Geo. 4, c. 88, s. 2, rule 1—or that Bigg had notice of any time or place appointed for payment over of the same, or that any of the monies received by Bigg, as alleged in the third breach, were received prior to the days appointed for paying over the same; and that the appointment of an office by the receiver-general, or his attendance within ten miles of the collector's place of habitation, and notice to the collector of the time and place appointed, for payment of the monies collected, constituted a condition precedent to his liability to be charged with any default—see the 3 Geo. 4, c. 88, rule 1, art. 4, and the 43 Geo. 3, c. 99, s. 50, by which it is provided that the collector shall not be compellable to travel beyond ten miles from his habitation.—*Fifthly*, that the payment by Bigg in the manner found in the special was a sufficient payment according to the condition of the bond, to discharge the plaintiff in error as his surety.—*Sixthly*, that the seizure of the lands and goods of the collector, or at any rate an endeavour by

the commissioners to ascertain whether or not he had any, was a condition precedent to the commencement of an action by them against the surety on the bond; and that it was not shewn on the pleadings, and did not appear from the finding of the jury, that the commissioners, previously to commencing the action, had used any endeavour to seize the lands and goods of Bigg, or to ascertain whether or not he had any—see the 43 Geo. 3, c. 99, s. 13—whereas it was expressly found that Bigg had some lands and goods that were not seized.—*Seventhly*, that the plaintiff in error ought to have had judgment by reason of the finding on the sixth, fourteenth, and fifteenth issues.

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Mr. Serjeant *Taddy*, for the defendants below, relied upon the arguments urged in the court below.

Cur. adv. vult.

There being a difference of opinion amongst the learned judges who were present at the argument, their several judgments were delivered seriatim, as follow:—

Mr. Justice WILLIAMS.—This case comes before us upon a special verdict. The question arises upon a bond given by the plaintiff in error for the due performance by a person of the name of Bigg of the duties of collector of taxes, to the defendants in error, commissioners of taxes, under the statute 43 Geo. 3, c. 99. To the declaration on this bond the defendant below pleaded, amongst other things not material to be noticed, (*fifthly*), “that Bigg did demand and collect all the assessments; and that from that time to the time of exhibiting the present bill, he had lands, goods, and chattels within the jurisdiction of the commissioners, of which they had notice, and which might have been seized and sold by them, but which they neglected to sell.” To which the plaintiffs below replied in the fol-

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lowing manner—"that Bigg did not faithfully demand and collect all the assessments; that he had no lands within their jurisdiction which they could seize and sell, of which they had notice; and that all the goods and chattels of the said Bigg within their jurisdiction, and of which they had notice, were seized and sold, and were inadequate to the satisfying the deficiencies of Bigg." And in my view of the case it is not necessary to advert further to the pleadings.

Special finding
thereon.

With respect to the special verdict, the material facts found are, "that the said R. Bigg had lands or houses after his alleged default in paying the latter sum, of the value of 121*l*., which could have been seized and sold by the commissioners under the statute 43 Geo. 3, c. 99, s. 52; and that he had goods after such default of the value of 200*l*., which could have been seized and sold by the commissioners." And also "that the said commissioners had not notice that Bigg was possessed of any houses, lands, or goods at the time of his default." The jury then find what I admit falls very short of notice that the said Bigg was possessed of goods.

Two questions arise, depending upon the construction of the above-mentioned statute—first, whether the sale of the lands and goods of Bigg be a condition precedent to the commencement of the action against the surety—and next, whether notice by the surety of the existence of such lands and goods to the commissioners be necessary.

First point.—
Opinion that the
sale of the lands
and goods of
Bigg was a con-
dition precedent
to the com-
mencement of
an action against
the surety on
the bond.

The first, and, as it seems to me, the principal question arises upon the construction of the 43 Geo. 3, c. 99, s. 13, which, after providing that the collectors, if required, shall find good and sufficient security in the manner prescribed, contains this proviso—"Provided always that no such bond shall be put in suit against any surety or sureties for any deficiencies other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector in pursuance and by virtue of the directions

and powers given to the respective commissioners by this act." Upon the construction of this clause, opposite inconveniences have been suggested in the course of the argument. On the one side it has been said, that, if the sale above alluded to be held a condition precedent, the consequence must be that a remedy intended for the relief of the parish may be suspended or wholly lost, whilst the commissioners are engaged in an endless and fruitless inquiry into the state of the collector's possessions: and, on the other, that, if it be merely discretionary with the commissioners whether they sue first and sell after, or do not sell at all, the surety may be harassed with the costs of an action, whilst the collector is at the same time in possession of property ten times more than the amount of his arrears. These extreme cases seem to be pretty nearly balanced, and are not very safe criteria for ascertaining the true decision; though it is observable that the first-mentioned inconvenience seems to have had a very full, if not somewhat undue share in producing the judgment of the court below. The true construction of a statute is, to give effect to the intent and object of the legislature as far as it is possible, and, if there be provisions seemingly inconsistent or contradictory, to reconcile them so as to further that intent. This is not only the proper mode of construction in this instance, but is so generally; and the proposition, I presume, needs only to be stated in order to be assented to. Comyns's Digest, Parliament (R. 10). Now, it seems to me hardly doubtful but that the provision in question was introduced expressly for the protection and benefit of the surety. To me, at least, its introduction is unintelligible except that be the meaning. The language, with the exception of the expression "put in suit" (upon which I shall observe presently), is perfectly plain and appropriate. This object also, it is to be observed, is quite consistent with the position of the surety, and his relation to the principal; because, neither from the general nature

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Observations on
the 43 Geo. 3,
c. 99, s. 13.

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of the bond, nor that relation, is there anything to raise the slightest inference that the former should become responsible except upon the failure of the latter: the nature of the thing implies it. The position also of this proviso is quite consistent with this view of the subject. In the earlier part of the section the liability of the surety is described, and then comes this proviso containing the restriction upon that liability: and, except it was intended to afford some special protection to the surety, why, it may be asked, was it introduced at all? It seems to me, therefore, that we have the intention of the legislature clear and explicit to relieve the surety. Except, therefore, the application of the funds (lands and goods) of the collector be deemed a condition precedent to calling upon the surety to make good "the deficiency," which I think (with that hesitation, however, which becomes one when aware of opposite opinions) is the true construction, no effect whatever is given to this part of the section, introduced expressly for the surety's protection; and, so far as he is concerned, it might as well be expunged from the statute altogether. This observation is strictly true, supposing the commissioners not to be compellable to levy contributions in aid of the surety upon the property of the collector after the former has been sued for arrears. And it is true to a considerable extent, if (which may be questionable) the commissioners may be compelled by mandamus, or otherwise, to reimburse the surety by sale &c. up to the extent of the costs of the action upon this supposition rightly brought against the surety in the first instance. And this, which I confess seems to me to be the obvious meaning of this proviso, is rather confirmed by attending to the particular expressions in which that meaning is conveyed. The words are—"no bond shall be put in suit for any deficiency other than what shall remain unsatisfied after sale of the lands, goods, &c." of the collector: that is, no bond shall be put in suit *for the arrears of the collector*, but only for

the deficiency, if any, after his property has been applied, as in reason and justice it ought to be, to the discharge of those arrears as far as it will go. And how is it possible to say that the arrears of the collector, and the arrears minus the proceeds of all his property, mean the same thing? Observations have been made upon the words "no bond shall be put in suit," as if they were distinguishable from "no action shall be brought" or "no proceedings shall be had or taken." I confess, however, that I am unable to comprehend any such distinction, and cannot but think that the three forms of expression above mentioned are perfectly equivalent both in a legal and a popular sense. About the latter, I presume there can be no doubt; and, as it seems to me, there is scarcely less as to the former. In the case of *Pepper v. Cooper*, 2 B. & A. 431, to a plea similar to the present, that the collector had goods &c. at the commencement of the action, the replication was "that there were not goods &c. of the collector sufficient to satisfy the deficiency for which *the bond had been put in suit*;" which latter words seem to me of necessity to have the same meaning as—"action had been brought." When therefore I see a provision expressed in plain terms, and, I think, with an obvious meaning, in perfect conformity to the situation and rights of the parties (principal and surety), we are bound, as it seems to me, to give it effect, except there be collected from some other part of the statute a decisive reason to the contrary. Nor do I think that there is anything in the 52nd section, to which reference has been frequently made, inconsistent with the view which I have taken. It will be observed that the two sections (the 13th and 52nd) are directed to very different objects. The former describes, as I have said, the liabilities of the surety, and, in the proviso, restricts them in the manner already alluded to: the latter gives powers to the commissioners both over the person and the property of the collector; and all these seem quite consistent with and in furtherance of

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what I understand to be the object of the proviso. Powers are given to the commissioners to get at funds which are to be applicable in ease of the surety; but the question of priority, that is, whether seizure and sale should precede suit, seems to me not to be necessarily involved in considering the effect of the 52nd section. It is true that different expressions are used in different parts of the section: the words first used are, "authorized and impowered;" then, "impowered;" and lastly, "impowered and required." And some reliance has been placed upon the latter expression, "required," not being employed instead of "authorized and impowered," in that part of the section where the seizure of the estate real and personal first occurs. I must own that this seems to me to be a very doubtful and precarious reliance. I very much doubt, and in truth do not believe, that the precise force and effect of these expressions were weighed with critical nicety before they were introduced into the clause: that they were used indiscriminately and at random, I think much more probable. It is observable also that the seizure of the *person* of the collector is first named in this section, to which object the terms "authorized and impowered" are properly applicable; and this perhaps may account for the omission of the word (of supposed superiority in pressure and cogency) "required." Upon the whole, therefore, bearing in mind the distinct purposes of the two sections, I think there is nothing in the latter to supersede what I consider to be the plain intent and meaning of the proviso in the former.

Remarks on
Pepper v. Cooper.

Before I quit this part of the subject, I cannot help observing that too little importance has been attached to the case I have already referred to, of *Pepper v. Cooper*. It is certainly true that the very point now under consideration was not before the court; but it is equally so that the whole statute, and this very question, were brought under their notice. In that case, two collectors were appointed, though one only acted, and the other was in truth only a

surety. To an action on a bond similar to the present, the surety pleaded, amongst other things, that there were goods not sold belonging to the collector who had not acted, and who of course was not in arrear; to which there was a demurrer: whereupon Lord Tenterden and Mr. Justice Holroyd are reported to have said, not that the question of whether the collector's goods were sold or not was wholly immaterial; not that the statute was merely directory, and that the commissioners might either sue or sell at their pleasure; but that the goods which ought to be sold before the bond could be put in suit, are the goods of the defaulting collector. Lord Tenterden says: "I am clearly of opinion that the bond might *be put in suit* without selling the goods of Pepper, who was a mere surety; for, though it appears on the face of the bond that he was a collector also, still he is not the collector contemplated by the act, whose goods must be sold *before proceedings are had upon the bond.*" I repeat that I by no means consider this case as an authority, and that I proceed upon the interpretation of the statute itself; but, at the same time, it is a satisfaction to have even the impression of those judges, who had so confirmed a habit of being right, in favour of my view of the subject.

I come now to the second point—of notice, and the question how far any is necessary from the surety to the commissioners, in order to set them in motion. This supposed necessity (as the statute itself is silent upon the subject) seems to proceed upon the superior information of the surety as to the property of the principal, and the duty thereby cast upon him to give notice of the existence of property which might be made available, before he can complain of any omission on the part of the commissioners. This, however, seems to me to depend a good deal upon a mistaken view of the nature and quality of the surety's engagement and obligation, which is not for the payment of a sum of money absolutely upon another's failure (in which

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Second point.—
Opinion that
notice by the
surety to the
commissioners
of the existence
of lands and
goods belonging
to Bigg, was
not necessary.

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43 Geo. 3, c. 99,
 s. 9.

case it is perhaps hard to suppose that a man would become bound for another without ascertaining his probable means of payment), but simply for accuracy and fidelity ; in which case it might be that one would be bound for another from well-ascertained experience of his conduct and habits. I say *might*, without pursuing the subject further, because I think an attempt to draw conclusions in this case from general probabilities is utterly precarious and insecure. It seems to me that our business rather is, to examine what and with whom the means of knowledge are according to the provisions of the act of parliament itself. Now, so far as the surety is concerned, the statute, as might be expected, is silent as to recommendation of caution or means of information. He is left to himself. With the commissioners, however, the case is otherwise.

By the 9th section, the commissioners are to appoint assessors, who are to act upon oath, and moreover are to be charged and instructed by the commissioners in the requisites for discharging their duty. Further, by the same section, the assessors are to return two or more able and sufficient persons of the places for which the assessors act, to be collectors. It seems therefore to be clear, that, in the due performance of their duty, the assessors are bound to inquire into the sufficiency of the persons returned, including of course their substance and property. And, if the matter had rested here, it might perhaps have been not unreasonable, considered as a statutory mode pointed out to the commissioners of ascertaining by deputed authority the means of the persons to be appointed. But the section goes further, and enacts that the persons so returned by the assessors are to be *appointed* by the commissioners ; and, as persons are presumed to do their duty (and particularly when acting upon oath, for, the commissioners also are sworn), it must be taken, as against the commissioners, that they became acquainted with the property of the persons about to be appointed, and of this collector, Bigg,

amongst the rest. And this supposition and construction are the more probable and reasonable, because the collector is not required by the 13th section to find security at all events, but only if required by the commissioners. This therefore seems to imply that the commissioners ought to inquire in each case, or else how can they exercise a discretion as to requiring or dispensing with security in the case of each appointment? and why is notice to be required from the surety to those who by the very supposition of having done their duty have acquired knowledge already?

Some reliance has been placed upon that phrase in the 52nd section already commented upon—"wheresoever the same (estates &c.) *can be* discovered and found;" as if the meaning had been, that such property as the commissioners had not notice of from the surety must be deemed property that cannot be discovered. It seems to me, however, that this expression is merely intended to describe the exertions expected from the commissioners in pursuing property not in the hands of the collector himself, but of others, namely, his heirs, executors, or administrators, wheresoever they can be discovered or found: that is, the commissioners are not to confine their search to what is in the actual possession of the collector, but, if they can, to pursue it elsewhere. But it would, in my opinion, be a most forced and hazardous construction to interpret "discovered" to mean—"whereof the commissioners had notice from the surety." Finding, therefore, nothing in the statute that requires notice from the surety expressly, nor, as I think, impliedly, either from a fair construction of that statute or from the situation of the parties and their relative means of knowledge; but, on the contrary, that the duty of pursuing the property, if any, is plainly and unequivocally cast upon the commissioners; I think the allegation unnecessary; the finding upon that subject in the special verdict immaterial; that the plea contains a

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good defence to the action without it; and that judgment should be given for the plaintiff in error.

Mr. Justice PATTESON.—The principal matters on which the court took time to consider regarded the issues on the 5th and 6th pleas: and the first question which arises is, whether the proviso in the 13th section of the statute 43 Geo. 3, c. 99, creates a condition precedent in favour of a surety, so that no bond can be put in suit against him until a sale has been made of the principal's lands and goods.

First point.—
Opinion that the
sale of the lands
and goods of
Bigg was a con-
dition precedent
to the com-
mencement of
an action against
the surety on
the bond.

After an attentive consideration of the whole act, and with all deference to the opinion of those of my learned brothers from whom I differ, I am not able to construe that proviso in any other sense than as creating such condition precedent. It is introduced in terms for the benefit of the surety, and, as I conceive, must be read in its obvious sense, such as any unlearned person would put upon it who proposed to become a surety and read the act of parliament with a view to discover the nature of his engagement, the liabilities he is to incur, and the means of protection which are afforded him. Now, the act, in s. 13, directs a joint and several bond to be taken from the collector, with sureties, conditioned that the collector shall duly demand the sums assessed, shall duly proceed against defaulters, and duly pay such sums as shall come to his hands. It then directs, that, if he makes default, the commissioners shall prosecute, that is, put in suit, the bond: Provided always, "that no such bond shall be put in suit against any surety or sureties for any deficiencies other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector in pursuance and by virtue of the directions and powers given to the respective commissioners by this act." What are those directions and powers? They are contained in the 52nd section, which authorizes and impowers (not re-

quires) the commissioners, in case of default, to make sale in a summary manner of the collector's lands and goods wheresoever the same can be discovered and found. The commissioners, not being *required* to make such sale, are not bound to do so previous to putting the bond in suit against the collector; for, he is not within the proviso of the 13th section: but they may do so if they please, and, if they do, it is plain, that, as the bond is one which comes within the provisions of the statute 8 & 9 Will. 3, c. 11, s. 8, they cannot afterwards recover on the bond, even against the collector, more than what remains unsatisfied after deducting the produce of the sale. Still, it is optional with them to make no sale, and put the bond in suit severally against the collector for the whole deficiency. But the legislature, by the proviso in the 13th section, evidently intended to put the surety in a better condition than the collector, which he could not be if the proviso be construed as directory only, or if it be construed as applying only to cases where the commissioners had chosen to exercise their power by selling. Indeed, then the proviso would be nugatory; for, it would do no more than the statute of William had already done. The only way, therefore, to give the surety that advantage which the legislature plainly intended him to have, is, to construe the proviso in its obvious sense, viz. that, before the commissioners put the bond in suit against the surety, they shall exercise for his benefit that power which is given them by the 52nd section. It is still optional with them—they may abstain from selling, and enforce the bond against the collector alone: but, if they wish to enforce it against the surety, they must first sell the collector's property. It has been suggested that they might exercise their powers under the 52nd section for the benefit of the surety, after having enforced the bond against him. But I confess I am at a loss to understand how they could be justified in making sale of the

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As against the collector, optional with the commissioners to seize and sell his goods &c., or proceed upon the bond.

Quære whether the commissioners could sell the collector's goods after judgment and satisfaction against the surety.

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Second point.—
Opinion that
lands or goods
of the collector
of which the
commissioners
have no notice
or knowledge,
must be consid-
ered as not in
existence.

collector's property to satisfy a debt which was already discharged by the surety.

If, then, the sale be a condition precedent, the second question which arises, is, whether it is sufficient to aver in the pleadings that there were lands and goods of the collector unsold, or whether it is necessary to add that the commissioners had notice of such lands or goods. On this question I have entertained great doubt: for, I find no clause in the act in terms requiring such notice, and the phrase which approaches nearest to it—"wheresoever the same can be discovered and found"—seems intended to apply only to the place at which they may be found, and to give a larger power of seizure than the commissioners might otherwise have. But, on the whole, it appears to me that lands or goods of the collector's of which the commissioners have no notice (and by notice I understand knowledge, by whomsoever communicated or howsoever acquired,) must be considered as lands or goods not in existence. The inconvenience which would arise from a contrary decision is manifest: the commissioners have no means of finding out concealed property; yet, on an action being brought against a surety, it would be easy to bring forward some article unsold, and defeat the action; and so, toties quoties, till the surety also had removed all his effects. On the other hand, there is no hardship in calling upon the surety to give the commissioners information of any property that he desires to have sold for his benefit; which information it would not be difficult for him to give if he had used ordinary prudence in ascertaining the property of the collector before he became surety for him; or, if actual notice by the surety be not required, and the commissioners could be shewn to be wilfully ignorant of the collector's property, by reason of their omitting to make inquiry, the surety, if injured, might have his remedy against the commissioners for such omission. It is true

that the act requires the commissioners to select a collector from the persons presented to them, and therefore at the time of his appointment they have their attention called to his sufficiency in respect of property: but still I do not think that this circumstance makes it incumbent on them to inform themselves of every article he may possess within their jurisdiction; and, unless it be carried to that extent, I think it must be necessary for the surety to shew that they had knowledge of the existence of the property the want of sale of which is set up as a defence.

As I am of opinion that the sale is a condition precedent, but the sale only of those lands and goods of which the commissioners have notice or knowledge, the third question arises, as to the effect of the pleadings and the special verdict in this particular. Now, the pleas in substance allege the existence of saleable lands and goods of which the commissioners had notice. The replications assert that there were no saleable lands of which the commissioners had notice, and that all the saleable goods of which they had notice were sold. The rejoinders assert that there were saleable lands and goods not sold, omitting all mention of notice. The special verdict finds the existence of saleable lands and goods which have not been sold; but also finds the want of notice as to the lands, and that the plaintiffs (below) had reasonable grounds to believe that the collector had goods. I consider this latter finding as equivalent to a finding of want of notice as to the goods also. It certainly is not a finding distinctly that they had not notice; but, in the words of my Lord Chief Justice Tindal, in giving the judgment of the court of Common Pleas, "such finding, neither by the rules of pleading, nor in the natural meaning of the words themselves, can supply the want of actual notice or knowledge: it does not even amount to an assertion of actual belief in the commissioners." 9 Bing. 565, 2 M. & Sc. 673. Now, if the point of notice be involved (though

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Third point.—
As to the effect
of the pleadings
and special find-
ing with respect
to notice.

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informally) in the issues, thinking as I do that the point of notice is material, I hold that the verdict is conclusive, and that judgment must be for the plaintiffs (below). And this, as it appears to me, is in truth the real state of the pleadings, and that the notice is informally part of the issues; but I have considerable hesitation in coming to that conclusion. However, if the point of notice be excluded from the issues, then, as the immediately preceding pleading, viz. the replications, deny the notice, and the rejoinders, which take issue on the existence of the lands and goods, do not assert the notice, they admit the want of notice, and so render the issues immaterial, and leave the plaintiffs wholly unanswered on this part of the record. But it is denied that there is any such admission; and then it is said that the jury were not at liberty to find a fact not involved in the issues: therefore that their finding must be taken as a finding only of the existence of the lands and goods, and so must be treated as a verdict for the defendant. Now, whether the issues be material or not, I apprehend that the jury are at liberty to find any facts not inconsistent with the pleadings: and here, the want of notice, so far from being inconsistent with the pleadings, is either admitted by them, or at all events not denied, upon the supposition that notice is not involved in the issues: and, though it be true, that, if the issues do not involve the point of notice, they must be treated as found for the defendant; yet the special finding of the jury may be used to shew, that, if the issues had been properly taken, the verdict would have been for the plaintiffs. Either, then, on the ground of want of notice being admitted by the pleadings, or on the ground of the special finding, it appears that by no form of pleading could the defendant entitle himself to a verdict on the merits; which is exactly the case in which all the authorities shew that judgment non obstante veredicto ought to be given. Had this been doubtful, and the issues been simply imma-

terial, the course for the court below would have been to award a repleader: but it seems that a court of error cannot so award—*Bennett v. Holbeck*, 2 Saund. 319.

Upon the whole, and for the reasons I have stated, I am of opinion, that, as regards the issues on the 5th and 6th pleas, the plaintiffs (below) are entitled to judgment. The inclination of my opinion is that they are entitled to that judgment simpliciter, as given by the court below; but, if I am wrong in this, I still should think them entitled to judgment non obstante veredicto.

The other points in this case were disposed of, as I understood, upon the argument. However, I have reconsidered them, and will state shortly the conclusion to which I have come.—The first objection was, that the bond is not taken conformably to the 43 Geo. 3, c. 99, s. 13, because it is conditioned to pay the receiver-general and also the commissioners. The answer is, that, even if the latter part of the condition be void, it will not vitiate the former part, which pursues the language of the 48th section. Besides which, it should seem that a case may arise under the 39th section in which it might be the duty of the collector to pay arrears remaining in his hands to the commissioners themselves. Some observations were made on this part of the case as to the subsequent statute 3 Geo. 4, c. 88; but, on examining that statute, it appears to me to have nothing to do with the present question.—Another objection was, that the bond is conditioned for payment to the receiver-general at the times by the said acts appointed. Now, no times are appointed by the acts. The answer is, that the receiver-general is empowered by the 48th section to appoint the times, and those times, when appointed by him, are the times appointed by the act. It is said that no averment of such appointment is made in the pleadings; but, general performance is pleaded, and the third breach alleged in the replication to that plea is, that the collector did not pay

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to the receiver-general the monies collected at the times by the said acts appointed; on which there is a special verdict finding that he did. It must, therefore, be presumed that the receiver-general had appointed some times of payment, otherwise such verdict could not have been found. Another objection, and that a very important one, and which was intended to be raised by the special verdict, was, that the collector had performed the condition, inasmuch as it is found by the special verdict that he did well and truly pay to the receiver-general all monies collected by him *upon the days and at the times by the acts appointed*: although it adds that he did not pay the whole to the service of the year for which he was collector as stated in the condition, but to the account of previous years. Now, without entering minutely into an investigation how far the parish may be affected by holding such payment to be a performance of the condition, and by compelling them to have recourse to the sureties of former years in which the deficiencies first arose; or how such a fluctuating body as the inhabitants of a parish are or ought to be made liable for the defaults of former years; I must say, that the payment in this case appears to me to be no more within the true meaning of the condition of the bond than it would have been if the collector had applied the money towards the discharge of any other debt which he owed. Nor do I think that it would make any difference if it had been shewn that the receiver-general was a party to the improper appropriation, though I am far from supposing that he was. The facts, indeed, seem to indicate that he took the money from the collector as the arrears of former years, which had been uncollected in them: and though it was argued that he had no power to do so by any clause of the act, yet it is obvious that the practice must be so to receive the arrears. Whether that practice be legal or not, or whether the receiver-general was negligent or not, seems to me to be quite immaterial; for,

his overlooking or joining in the mis-appropriation of money by the collector cannot make the collector's act less illegal; and it is for the collector's act that the present defendant is answerable.

I have not referred to any authorities on these questions, for I do not find any directly in point. *Pepper v. Cooper*, 2 B. & A. 481, was relied on; but the facts make it very distinguishable.

For these reasons, I entirely concur in the judgment of the court of Common Pleas, and am of opinion that it ought to be affirmed.

Mr. Baron BOLLAND.—The only difficulties that present themselves to me in this case, arise upon the issues raised on the 5th and 6th pleas. The 5th plea in substance is “that Bigg did demand and collect all the assessments; and that, from that time to the time of exhibiting the present bill, he had lands, goods, and chattels within the jurisdiction of the commissioners, of which they had notice, and which might have been seized and sold by them, but which they neglected to sell.” The sixth plea differs from the fifth in no other particular than in stating that Bigg was possessed of and entitled to goods and chattels: and the question is, whether any of the words in the act of the 43 Geo. 3, c. 99, make the sale of the lands and goods of the collector and principal in the bond a condition precedent to the putting the bond in suit against the plaintiff in error, one of the sureties for the collector. This question depends upon the 13th section of the statute, which, after enacting that every bond given to the commissioners by way of security shall be prosecuted by such commissioners on any failure or default of the collector, contains the following words—“Provided always that no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and

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chattels of such collector or collectors, in pursuance of and by virtue of the directions and powers given to the respective commissioners by this act." In order to determine the true construction intended by the legislature to be put upon this proviso, it may be useful to look at the advantages obtained by persons becoming sureties in these bonds, and to consider whether, to prevail upon them to do so, it was not intended to throw around them all the protection that the nature of the transaction admits of, from the consequences of the failure or default of their principals, and not to render them liable for any deficiency till the property of the collector, as far as it can be ascertained, shall have been made available by the commissioners, and applied as far as it will go in satisfaction of such deficiency. By the 9th section, the assessors are to return the names of two or more able and sufficient persons within the bounds and limits of those parishes or places for which they shall be assessors respectively, to the commissioners, to be by them appointed collectors of the several duties to be raised and assessed by them as such commissioners. By the 13th section, it is enacted that such persons as shall be presented to the commissioners to be collectors, shall, if required, give good and sufficient security equal to the whole duty and sums of money assessed in and to be collected in each district: the commissioners are to take a joint and several bond, with two sureties at the least; and, on failure of the persons so named giving such security, the commissioners shall be at liberty to appoint any other persons who can give such security. The amount for which the bonds are directed to be taken is very considerable; in the case before us the sum is no less than 4,048*l*. The inhabitants of the parishes and places in and for which the assessments are to be made and collected are deeply interested in the fidelity and solvency of those by whom the collections are to be made; and it is obvious that it is greatly

advantageous to the public to hold out every inducement to persons to come forward as sureties who may be inclined to forward the welfare of those who are desirous to become collectors. It was with this view, as it appears to me, that the proviso was introduced. If the words be taken in their plain and obvious sense, the commissioners are called upon to look to the interests of the surety before they put the bond in suit against him; and the surety finds his responsibility and risk diminished by the proviso. But, to say that it is merely directory, would be to deprive him of the greater part of the protection that it is manifest to me the legislature intended to give him. The proviso, in my opinion, creates a condition precedent in favour of sureties in bonds taken under the authority given to the commissioners by the 13th section of the act; and such bonds are not to be put in suit (which I consider to mean "no proceedings shall be had,") against any surety for any deficiency other than what shall remain unsatisfied after the sale of the lands, tenements, goods, and chattels of the collector by virtue of the directions and powers given to the commissioners by the 52nd section of the statute.

The second question that presents itself, is, whether, although the proviso may create a condition precedent, the commissioners are chargeable with any default in not seizing and selling the lands, tenements, goods, and chattels of the collector before putting the bond in suit against the sureties, until they have had notice that the collector was possessed of lands, tenements, goods, and chattels, or whether it is sufficient for a surety to say that his principal, the collector, was possessed of and entitled to divers lands, goods, and chattels as of his own property, and within the jurisdiction of the commissioners, and which lands, goods, and chattels were subject and liable to be seized and sold, without stating that the commissioners had notice of them. I am of opinion it is not. I think it

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is essential to the validity of the plea, that the surety should aver that the commissioners had such notice. Although the commissioners are, by the 52nd section of the statute, for the benefit of the public, and for the protection of the surety, invested with very large powers, viz. of seizing and selling the lands and goods of the collector, it cannot be taken that they are to be considered to have knowledge of the lands, tenements, goods, or chattels of the collector, and to be held answerable for not seizing and selling them, unless notice be brought home to them of the possession of such property by the collector. The commissioners are mere official agents in the matter: the parties really interested are the inhabitants of the district, who, in case the bond cannot be made available against the collector or his sureties, are liable to repay to the crown the amount of the deficiency occasioned by the default or insolvency of the collector and the sureties; the extent of whose liabilities upon the bond depends upon the amount to which the property of their principal may be made available. That such notice was thought necessary by the defendant (below) appears by his having averred in the 5th and 6th pleas, that the plaintiffs (below) had such notice. The plaintiffs by their replications to those pleas say that Bigg had no lands or goods and chattels within their jurisdiction which they could seize and sell, of which they had notice; and that all the goods and chattels of the collector of which the plaintiffs had notice, were seized and sold. The defendant (below) by his rejoinders does not assert notice, but tenders immaterial issues. And, as it is distinctly laid down by Lord Chief Justice Hale, in the case of *Bennett v. Holbeck*, 2 Saund. 319, that a repleader cannot be awarded in a writ of error, and such has, as far as I can find, been the rule ever since; and, if it were otherwise, as a repleader is not grantable in favour of the person who has made the first default in pleading; and as such person is

in this case the defendant; I am of opinion that no repleader could be awarded. It appears to me that the rejoinder admits, that, if there were lands and goods, there was no notice thereof to the plaintiffs; and therefore they are entitled upon that confession, to judgment on the issues to the 5th and 6th pleas, non obstante veredicto, as those pleas are substantially bad in law. Authorities for the opinion I have formed, are to be found in *Lacy v. Reynolds*, Cro. Eliz. 214, *Staple v. Heydon*, 6 Mod. 10, *Rex v. Phillips*, Str. 394, *Horne v. Lewin*, 1 Ld. Raym. 641, and *Clears v. Stevens*, 8 Taunt. 413.

For the above reasons, I think the judgment of the court of Common Pleas is right in substance, though wrong in form; and that it ought to be affirmed.

Mr. Baron PARKE.—In this case I am of opinion that the judgment of the court of Common Pleas ought to be in substance affirmed. Several objections were taken on the argument, upon most of which the court intimated a clear opinion in the course of it: and it is not now necessary for me to notice more than four. First, it was contended that the bond was illegal and void, because the condition was, to pay the amount collected to the receiver-general and the commissioners if required, and the latter provision was against the statute. The answer to this objection is, that such provision is not illegal; for, if there is a case in which the commissioners may lawfully require the payment to be made to themselves or two of them, or to such person as they shall appoint, the condition must be construed to have reference to such a requisition; and that they have such a power appears by the 48 Geo. 3, c. 99, s. 39, for, they may call the collector before them after his year has expired, if the arrears are unpaid, and make such order therein as they shall judge necessary, to prevent any failure in the payment of the assessment. A request to pay to themselves, or to pay to two of themselves, or to pay to an ap-

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pointee, might lawfully be made for the purpose of preventing such failure. And, besides, if no such request be made, that part of the condition is inoperative. It is at the most therefore a contingent illegality, and in the meantime the rest of the condition is legal. And the defendant has not pleaded that such a request has been made. This first objection therefore cannot prevail. The second was, that there was no statutory time fixed for the payment of the sums collected to the receiver-general, but that the receiver-general himself is to appoint the days, and that there is no averment in the assignment of the third breach (on which alone the plaintiff is entitled to recover, if he is entitled at all) that such days were appointed. But it is clear, that, after verdict, the breach is well assigned, and it must be taken that days were fixed by the receiver-general, which days when so fixed would be days appointed by the acts of parliament. On those days, the jury find that the collector did pay all the sums collected by him; he made the payments precisely at the times required by the condition of the bond; but he did not pay all those sums to the service (it would be more correct to say, to the *account*) of the year for which he had been appointed collector. A third objection is then made, that such a payment is nevertheless a good compliance with the terms of the condition, by which the collector is "well and truly" to pay to the receiver-general all the sums of money collected by him. And this objection is one of those which the special verdict was intended to raise. I am clearly of opinion that such a payment does not satisfy the terms of the condition. The special verdict finds that Bigg paid 698*l.*, part of what he received of the taxes as collector for 1828-1829, to the service, that is, on account, of former years during which he had been collector. The condition of this bond is to be construed precisely in the same way as if another person had been collector for a former year: and, could it then admit of any doubt but that it would be

a breach of a condition to pay "well and truly" to the receiver-general, if the money had been lent to such former collector to enable him to pay his arrears, although the money had been so applied? This case is precisely the same, as far as relates to the question whether there has been a breach of the condition. It is in effect, for this purpose, an appropriation by Bigg to the payment of his own debt; though doubtless the damage to the parish is not necessarily the same as if Bigg had applied the amount to pay off a private debt of his own; and, in that respect, there is some inaccuracy in the report or judgment in the Common Pleas—9 Bing. 563, 2 M. & Sc. 640. But, on this writ of error, we cannot inquire into the amount of damages, which the jury have assessed. I would by no means, however, intimate an opinion that they have assessed them improperly; and I would observe that it makes a material difference to the parishioners, as a fluctuating body, whether the collections of one year are paid to the account of that year, or to wipe off the arrears of a former year for which also the same person has been collector. In the latter case, suspicion is lulled, and no inquiry is made until after the lapse probably of some years, when the collector is altogether insolvent, and the sureties for the prior years are no longer available; and then the new inhabitants of the parish become responsible for and have the arrears due in the time of their predecessors levied on them; whereas, if each year's collection is paid to the account of its proper year, the deficiency is immediately discovered, the sureties for the year in which it took place made responsible; the collector himself is perhaps more able to pay; and there is at least a better chance that those who were inhabitants at the time of the default will bear the consequence of it. The precise pecuniary compensation for this injury to a fluctuating body it is difficult to estimate: but the measure of damages must be the same against the sureties as against the principal; and I see no

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safer rule than to give the full amount which the principal ought to have himself paid, in order that the plaintiffs may now apply it to the same object.

The last and most serious objection is, that, under the circumstances found by the special verdict, the action will not lie against the defendant, the surety. The facts found are, that Bigg after his alleged default had lands or houses to him belonging of the value of 121*l.*, and goods to the value of 200*l.*, which could and might have been seized and sold before the commencement of the suit by the commissioners; that the commissioners had not notice of Bigg's being possessed of the houses or lands, but before the commencement of the action they had reasonable grounds for believing that he possessed goods at the time of the default which might have been seized and sold by them. The court of Common Pleas, without deciding whether the seizure and sale of the lands and goods was a condition precedent to the plaintiff's right to recover, according to the true construction of the 43 Geo. 3, c. 99, s. 13, were of opinion that such sale could only form a condition precedent when the existence of such property was *known* to the commissioners at the time of the commencement of the action; and that such qualification is necessarily *implied* in the clause in question: and on that ground they gave judgment for the plaintiffs below on the issues raised on the 5th, 6th, and 12th pleas, being the 12th, 13th, and last issues.

In turning the special case on which that court gave its opinion into a special verdict, the judgment of the court is entered on the record as a judgment that the 12th, 13th, and last issues ought to have been found for the plaintiffs. I have a difficulty in saying that the judgment in this form can be supported, because the facts found do not negative the affirmations in those issues. The rejoinder to the replication to the 5th plea, which raises the 12th issue, is, that Bigg had divers lands within the jurisdiction of the

commissioners which they might have seized and sold, and that all goods of Bigg that might have been found were not seized and sold. The special verdict finds these facts for the defendant; and I think the knowledge of or notice to the commissioners of these facts is not in issue at all upon this rejoinder. If so, the 12th issue should have been found for the defendant: and then there is a difficulty in giving judgment non obstante veredicto on this issue for the plaintiff, on the principle upon which the court of Common Pleas proceeds, viz. that it was not a condition precedent that the commissioners should sell either land or goods unless they had notice thereof; for, the plea contains an averment of notice; and I doubt if the rejoinder can properly be said to contain a confession that they had no such notice if there were lands and goods; and a judgment non obstante veredicto always proceeds upon the implied confession contained in the pleadings, and its insufficient avoidance. In truth, there is no affirmative and negative of one distinct proposition involved in the issue: the replication does not aver simply that there were no lands and goods, but that there were none *known to the plaintiffs*; whereas the rejoinder puts in issue the simple fact, that there were lands and goods. I am, therefore, disposed to think that the court ought, upon the principle upon which their judgment proceeded, to have adjudged the issue immaterial, and awarded a repleader—which course a court of error cannot pursue. If, however, I am wrong in this respect, and there is such a confession of want of notice, I can have no difficulty in agreeing with the court of Common Pleas, that the existence of such property, without notice, is certainly not a bar to the action. But I go further, and think it is not so even *with* notice.

If the 5th plea be bad in substance, that is, if it be not a condition precedent to the plaintiffs' right to recover, that they should seize and sell all the lands, tenements, and goods of the collector, although they had notice that there

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were such, then this court is bound to give judgment non obstante veredicto on the confession in that plea and its insufficient avoidance. And the principal question in the cause is, as it seems to me, whether the provision in the 13th section of the 48 Geo. 3, c. 99, does, when there is notice to the commissioners, constitute a condition precedent: and I am of opinion that it does not. In the first place, I think it is discretionary in the commissioners whether they will seize or not, and this proviso is contingent on the actual exercise of that discretion, and has no effect at all unless they do. In this case they have not so done: and, if this is not so, but the clause is obligatory upon them to seize, yet I think that the breach of their duty in this respect is no answer to the action.

First, it seems to me to be discretionary in the commissioners to seize, and this proviso does not operate until they do. The clause in question provides that sureties shall be given for the persons presented to the commissioners as collectors, if the commissioners require it, and, in case they are not given, authorizes the commissioners themselves to appoint collectors who can give security. So far the enactment gives a discretion to the commissioners, which however is qualified by the 14th section. It then proceeds to order, that, in case of failure or of default by the collector, every bond shall be prosecuted by the commissioners. In that respect the clause is obligatory. Then comes the proviso—"that no such bond *shall be put in suit* against any surety or sureties for any deficiency other than what shall remain unsatisfied after the sale of the lands, tenements, goods, and chattels of such collector, *in pursuance and by virtue of the directions and powers given to the respective commissioners by that act.*" The directions and powers referred to are those contained in the 52nd section, which provides, that, if a collector is guilty of a default in paying, the commissioners are *authorized and empowered* (not commanded) to imprison the person and seize and se-

cure the estate real and personal of such collector to him belonging, or which shall descend or come into the hands or possession of his heirs, executors, or administrators, wheresoever the same can be discovered and found. If they seize, they who do so are also empowered to appoint a meeting of the commissioners of the division &c., and the commissioners present at that meeting, if the monies are not paid, are empowered and *required* to sell and dispose of the estates so seized and secured, and apply the money to satisfy the arrears and the costs and charges. Now, it is quite clear, under this clause, that it is purely discretionary whether the commissioners seize the estate, real or personal, or not: they have the power of determining whether it is worth while, from the nature of the property, its value, the difficulty of obtaining and converting it, and the expense of carrying their powers into effect. Ought we not, therefore, to read the proviso in the 13th section, which expressly refers to the directions and powers in the 52nd section, and which are undoubtedly discretionary, just as if the former section had provided that the bond should not be put in suit for any deficiency other than such as remained after sale of the estate, real and personal, pursuant to the discretionary power vested in the commissioners, that is, *if the commissioners should think fit* in their discretion to seize the estate real and personal? If not, this consequence will follow, that the commissioners, who have a discretion by the 52nd section, and that no doubt for the benefit of the parish at large and the public and all persons interested, to seize or not, are yet compellable to do so under the penalty of not being able to sue on the bond for the deficiency if they do not; so that, if they in their discretion think the public interest and the interests of all best consulted by not incurring the expense of a seizure of property of no value, the public must suffer by losing the remedy on the bond against the sureties; for it is in truth their loss. If the commissioners took this bond and were

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acting for their own benefit, there might be some reason for saying, that, if they did not choose first to take the estate of the principal, they should not sue the surety; but, if they act, as they do, not for themselves, but for the public, it appears to me to be impossible to preserve the discretion given by the 52nd section, without qualifying the 13th section, and making the proviso therein a contingent direction or order not to sue, if the discretion should be exercised, until the sale should have been completed. I am therefore of opinion that this proviso in the 13th section of the statute has no operation unless the commissioners choose to seize under the powers of the 52nd section.

But, if this construction be not correct, and the proviso is obligatory on the commissioners in *all* cases, then arises the third question—Is the compliance with the enactment a condition precedent, and the noncompliance a bar to the action? I must say I am of opinion that it is not. In the first place, the language of the proviso is not that *no action shall be maintained on the bond*; but it comes by way of qualification on the former part of the clause, which commands the commissioners to prosecute the bond on any failure or default. It is therefore a command to them *not to put the bond in suit* in the particular case contemplated by the proviso: but it is no more. Had the legislature intended to make the noncompliance with this direction an absolute bar, I cannot help thinking they would have used different language. But it is not on the use of the precise expressions that I place so much reliance, as on the consideration of the consequence to which the construction contended for would lead. The consequence would be, that no action would lie against a surety for the benefit of the public, if the collector had any real or personal estate, of any description, of any value, if the commissioners knew of its existence, wherever such estate might be, and whether it was in reversion or remainder, and whether he ever had the actual possession or not: for, by the 52nd

section, all which comes to the hands or possession of the heirs, executors, or administrators, may be seized; whatever difficulty the commissioners might have in seizing or securing it or rendering it available, and whatever time it might require to reduce it into money, still it must be done before the sureties can be sued: and thus the parish, it may be well conceived, would in many cases lose the benefit of the bond altogether. On the other hand, what is the consequence of holding that the proviso, though obligatory on the commissioners, is not a condition precedent to the right of action? The parish and the public lose nothing; their remedy is unimpaired: but it is said that the clause is introduced for the benefit of the surety, as unquestionably it is; and that he will gain nothing unless this construction prevails: because he can have no remedy to compel the commissioners to seize and sell, either at law or in equity. If the proviso be obligatory on the commissioners (and I am now arguing on that supposition, for, if it be *discretionary*, there is an end of the case), I cannot see why a *mandamus* would not be granted to compel them to perform their duty to the surety, as it unquestionably would on behalf of the parish to compel them to sue on the bond in pursuance of the direction in the 13th section: nor do I know why he might not have a remedy in equity against the commissioners to oblige them to sell and apply the proceeds in his aid. But, supposing it were not so, and the surety has no legal or equitable remedy to enforce the obligation, does it follow that he has no benefit from this proviso? Certainly not. He has this benefit—that they have a duty imposed on them to seize and sell in relief of himself: this is the same benefit that any one has from a duty imposed on public functionaries, who are to be expected honestly to perform their duty; and, if from corrupt motives they do not, he has the same remedy as against all other public functionaries similarly situated. It is by no means any impediment to construing any clause to

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be directory, that, if it is so construed, there is no remedy for noncompliance with the direction. Thus, the statutes which direct quarter sessions to be held at certain times in the year, are construed to be directory (*Rex v. The Justices of Leicester*, 7 B. & C. 6, 9 D. & R. 772), and the sessions held at other times are not void; and yet it would be difficult to say that there would be any remedy against the justices for appointing them on other than the times prescribed by the statutes. From the nature of the enactments, the courts have rightly concluded, that, though the legislature intended the precise periods to be fixed, they did not intend the consequence of a deviation to be that the appointment would be void. In like manner, if the legislature did mean to oblige the commissioners to seize for the benefit of the surety, and not to bring the action until they did, I think it may be concluded that they never intended that such action should be altogether nugatory if brought.

I have treated this question as one arising for the first time, and I think I am warranted in so doing, for the dicta which have been cited by my Brother Williams from *Pepper v. Cooper* cannot be considered in the light of an authority upon this point.

For the reasons above given, I think the 5th plea does not in substance contain any matter in bar of the action. The like observation applies to the 6th and 13th pleas, on which the other issues are raised: and more particularly to the 12th, which does not aver that the plaintiffs had notice that Bigg had any property. I am therefore of opinion that the judgment of the court of Common Pleas ought to be, in substance, affirmed; though I think the mode of entering up judgment on the 12th, 13th, and last issues, is in form wrong, and that the judgment should in that respect be reversed, the verdict on those issues being found for the defendant, and judgment given for the plaintiffs on the confession in the 5th, 6th, and 12th pleas, non obstante veredicto.

Mr. Justice LITLEDALE.—Many of the points raised in the argument have already received the notice of some of my Brothers, and upon these there is no difference of opinion, and I do not therefore go into a consideration of them. The points on which there is a difference of opinion on the construction of the statute of 43 Geo. 3, c. 99, are two—the first, whether the sale of the lands and goods of the collector be a condition precedent to putting the bond in suit against the surety—the second, whether, if it be a condition precedent, it applies to all the lands and goods of the collector, or only to those which were *known* to the commissioners; and I use the term “known,” because the word “notice,” which occurs in the pleadings, sometimes means that knowledge which is acquired by specific information given with a particular object, as in the instance of notice of dishonour of bills of exchange, and other cases; but, as applicable to the present case, I mean by the term “known,” *knowledge*, in whatever way it is acquired.

Upon the first of these points, I think the sale of the lands and goods of the collector is a condition precedent to putting the bond in suit. The 13th section, after prescribing the form of the bond of the surety, says, “every such bond given by way of such security as aforesaid, shall be prosecuted by the commissioners on any failure or default of the collector:” and then there immediately follows this proviso—“Provided always that no such bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collectors, in pursuance of and by virtue of the directions and powers given by this act.” Here, therefore, is a provision that the bond shall not be put in suit for any deficiency other than what shall remain unsatisfied after a particular thing done. It is quite clear, that, if the lands and goods have been sold, the bond can only be put in suit for the difference: but,

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if there are lands and goods, and they can be sold by the commissioners under the powers and directions of the act, the meaning of the clause is, that the deficiency must be ascertained first; for, otherwise, it is putting the bond in suit for the whole, when the act says it shall only be so for a deficiency. It is a very reasonable provision for a surety, that he shall not be called upon until all has been got from the collector that can be raised. But it is necessary to see what are the powers and directions given by the act, by which the deficiency is to be ascertained. They are contained in the 52nd section, which enacts, that, if the collector makes default in the particulars enumerated, the commissioners are authorized and empowered to imprison the person, and seize and secure the estate, both real and personal, of the collector, wheresoever the same can be discovered and found; and the commissioners who shall so seize and secure the estate, shall and they are empowered to appoint a time for a meeting of the commissioners; and the commissioners present at such meeting, in case the accounts of the collector be not delivered, or the money detained by him be not paid, are empowered and *required* to sell and dispose of all such estates which shall be for the cause aforesaid seized and secured. It is said that this clause, as to seizing the estates, is only directory to the commissioners, as they are only authorized and empowered, and not *required*, to seize; and that this is more strongly shewn, because, in a subsequent part of the clause, they are *required* to sell, and therefore a different phraseology is used. There is not the least doubt but that the clause as to seizing is only directory, and only gives a discretion to the commissioners, that, if the collector makes default, they may seize and secure the estates; and then, if at the subsequent meeting the collector does not pay up his deficiency, they are required to sell; which is all very reasonable—that they shall not be *required* to sell if he can redeem his estate. And then it is said, that, because the clause as to

the seizure is only discretionary with the commissioners, they need not seize unless they think proper; and, as the powers and directions as to the seizure and sale of the estates are not in point of fact exercised, and need not be so unless the commissioners think proper, the deficiency after the exercise of these powers is out of the question and does not and need not arise, and the bond may be put in suit without regard to that. But I think not: the 52nd clause is as to the conduct to be pursued towards the *collector*, and the commissioners will no doubt exercise their discretion as will best accord with the discharge of their duties to the crown, to the parishioners, and to the collector: but, if they do not think it right to enforce their powers, the sureties are not to suffer by that. The proviso in the 13th section is introduced for the benefit of the sureties, and the meaning of it in my opinion is, that he is not to be called upon till the commissioners have done all in their power to make the collector pay; and if for any reason they omit to do that, they are not to call upon the surety. If it be not a condition precedent, I do not see how the surety can have the benefit of the clause; for, if the surety be compelled to pay the whole, I do not think he could have a mandamus to oblige the commissioners to seize and sell: their power is, only to seize and sell if the collector has not paid the money: but, if the money has been paid by other means, the collector is no longer indebted to the commissioners. Besides, if a mandamus were to go, it must be for the whole direction of the clause, and that is, that the money arising from the sale shall be paid to the receiver-general, and then the surety would have to petition the crown to be repaid; and I should doubt whether a court of equity would compel a sale unless to carry the whole clause into effect, and so as that the surety might petition the crown when the money had got into the hands of the receiver-general. Perhaps the commissioners might of themselves sell, in order to relieve the surety: but, besides the doubt I entertain as to the power of the commis-

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sioners to sell after they have been paid by the surety, I do not think the surety ought to be put in the situation of having to rely upon what they may be disposed to do. It is very possible that some inconvenience, and in some cases loss, might arise if the bond could not be enforced against the surety till the estates are sold; for, certainly the proceedings under the 52nd section must be attended with delay. But I do not think we have anything to do with that consideration: the question is, upon the construction of the act as it is presented to us. Some distinction was raised in the argument as to the meaning of the words "prosecute" and "put in suit;" and that, because the word "prosecute" the bond was used without any restriction, the bond might be enforced by action immediately. But I think "prosecute" and "put in suit" are synonymous. In pleading a writ, the common phraseology is, *sued and prosecuted out of the court &c.*; and, if the word "sued" alone, or "prosecuted" alone, were used, it would mean the same thing as conjoining the two words: and in the 13th section, the restriction I think must be applied as well to the prosecuting the bond as putting it in suit.

Second point.—
Opinion that
the existence of
lands or goods
belonging to the
collector was no
bar to the ac-
tion, unless
it appeared that
the commission-
ers had know-
ledge of the fact.

The other question is as to notice or knowledge of the estates and goods—as to which there is more doubt; because there is no such word as notice or knowledge used in the act of parliament. The construction of the act of parliament must be such as to engraft upon it a reasonable intendment, arising out of the existing state of things; and I think it can only be intended that the commissioners shall be compellable to seize and sell for the benefit of the surety such lands and goods as they know of. It is impossible for them to seize things of the existence of which they are ignorant; and it would not be any breach of duty in them not to seize lands of which they had no knowledge. If they were negligent in not taking reasonable means, according to circumstances, to find out the effects, it might furnish some means of proceeding against the commissioners: but,

as a mere question of construction, whether they were bound as a condition precedent to seize that of which they had no knowledge, any acts of negligence or want of attention in that respect could not arise. I do not think the words "wheresoever the same can be found," apply to this part of the construction; for I think that means, wherever locally they can be found. The collector might have some small interest in public works and undertakings where there are a great number of proprietors, as to which the commissioners would have no means of information. So also an estate might have come to him as heir at law or devisee of a person who died the day before the bond was put in suit, of which the commissioners knew nothing: or he might have a small quantity of goods in some obscure room: and many other cases might be put, where knowledge of the fact of his having lands or goods, would be utterly impossible; and then, if knowledge was not made an accompaniment of the property, a very small amount of the effects, under circumstances before stated, would prevent the bond being sued upon. I do not consider that the question of hardship ought to influence my opinion either on one side or the other: but it may be observed that this construction does not seem to impose any great degree of hardship on the surety, because, if he looked after his own interest, a very little caution would enable him to make himself acquainted with at least the material parts of the property of the collector; and, if he is afraid that the commissioners may not be very anxious to get the information themselves, it would be very easy for the surety to give distinct notice of the property to the commissioners; not that I mean, as I have before stated, that express notice need be given; for, if they have knowledge by any means whatever, that constitutes notice within the meaning of the word "notice" as used in these proceedings.

Having come to this conclusion on those points on which the judges differ, it is now to be considered how the find-

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ing of the jury affects the question whether the plaintiffs or the defendant are entitled to judgment. The jury have found that Bigg had lands to the value of 120*l.*, which could and might have been seized and sold in pursuance and by virtue of the directions and powers given by the act; they also find that he had goods similarly circumstanced to the value of 200*l.*: but they further find that the commissioners had no notice of Bigg having the lands, but that they had reasonable ground for believing that he had the goods. This finding shews, that, as to the lands, the defendant, according to my opinion, cannot avail himself of a defence as far as relates to the non-seizure and sale of the lands. But, as to the goods, the finding amounts to nothing. They should have found either that the commissioners had or had not notice or knowledge; and, as it is a material fact whether they had notice or not the finding is imperfect on that point. If the meaning be that they had not notice, then this ground of non-seizure and non-sale would not avail the defendant: but, if it be taken to mean that they had notice or knowledge, then, in my view, it would constitute a defence. If the special verdict be imperfect in a point material for the judgment, there must be a venire de novo awarded. But, suppose the special verdict should be taken to negative notice, then, as the non-seizure and non-sale of the goods would furnish no defence, it must be inquired what is the effect of the issues being joined as they are, and the finding in the special verdict upon these issues. The 5th plea states that Bigg had lands and goods of which the commissioners had notice, and which were subject and liable to be seized, and could and might have been seized and sold, but which remained unsold by the commissioners. The 6th plea states that Bigg had goods of which the commissioners had notice, which were subject and liable to be seized and sold, and might have been seized and sold, but which goods had not been sold by the commissioners. The replication

to the 5th plea states, that Bigg had no lands which the commissioners could seize and sell of which they had notice; and that all the goods of Bigg of which the commissioners had notice were seized and sold. The replication to the 6th plea states that the commissioners did seize and sell all the goods of Bigg of which they had notice. The rejoinder to the replication to the 5th plea alleges that Bigg had lands which the commissioners could and might have seized and sold, and that all the goods of Bigg which could and might and ought to have been discovered and found by the commissioners, were not seized and sold in pursuance of the directions and powers given by the act, in manner and form as the plaintiffs had alleged. The rejoinder to the replication to the 6th plea alleges that the commissioners did not sell all the goods of Bigg, in manner and form as the plaintiffs had alleged. Both parties proceed regularly as far as the 5th and 6th pleas; and the replications upon them go towards bringing to an issue the real point in dispute. But, when the defendant comes to both the rejoinders, he drops all about the notice. Now, as notice is material, the rejoinders are bad, because they omit to put in issue a material allegation, and might have been demurred to. But the plaintiffs have not demurred, they have joined issue, and the cause has been tried; and, upon the finding of the jury, if the finding is to be confined to the very words of these issues, they are found for the defendant: but the defendant ought not to have judgment upon the merits of the case. Then, how is this matter to be treated? It may be said that the issue tendered by the defendant virtually includes notice; and, first, on the ground that the words "modo et formâ" embrace the notice. But I think not: the notice is a substantive allegation abridging the general statement of lands and goods, but the *modo et formâ* only goes to the mode of alleging the fact stated, and cannot go to a material substantive matter which varies the meaning of the other words. Then, it may be said,

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as the defendant began his pleading by alleging lands and goods of which the commissioners had notice, and the plaintiffs in their answer to the plea follow up the same account of the lands and goods by saying that the commissioners sold all the lands and goods of which they had notice: then, if the rejoinder says that there were lands and goods which had not been sold, it may be said that that must be intended of such lands and goods as both parties had previously introduced into their pleadings. That would be so if you consider the notice as in the nature of a description of the lands and goods; as, for instance, if the defendant had pleaded that Bigg had lands in the parish of A. which the commissioners did not sell, and the replication said they had sold all the lands of Bigg in the parish of A., and then the rejoinder said that they did not sell all the lands of Bigg, not saying anything about the parish; though that would be informal, yet, if they go to issue, it might be intended that the inquiry was only to be about the lands of Bigg in the parish of A., which lands were the ground-work of the defence: and so here, it may be said that it must be intended the inquiry is to be about lands of which the commissioners had notice, which is what the defendant puts his defence upon. But I doubt whether it can be so taken. Supposing it cannot, then, as the issue of having lands, taken by itself, is an immaterial issue, it would not be cured by verdict; for, though informal issues are cured by verdict, immaterial issues are not; and then, here it is sought to turn a finding which in words is for the defendant, into a finding which is to give a judgment for the defendants. The proper mode of proceeding, if the finding be on an immaterial issue, is, to award a repleader. But a court of error cannot do that. The plaintiffs may contend that they are entitled to judgment non obstante veredicto, but there seems a great difficulty in saying that; for, the rejoinder is not one which shews that the defendant has no defence on the

whole case, which is the ground of entering a judgment for the plaintiff in such a case. The finding of the jury that Bigg had lands, is not like an allegation which furnishes no defence; but it is part of an allegation which coupled with something else would constitute a defence; and that something else is imperfect and does not form part of the issue which the jury ought to try, and if found one way would shew there was a defence, but in the other way not. If the rejoinder could be taken to be a confession of the want of notice, that would be another thing, and perhaps judgment might be entered for the plaintiffs; because, if the defendant has admitted want of notice, then the finding of the jury that Bigg had lands, when coupled with the confession of the defendant that there was no notice, would shew that he had no defence. But I do not think that the defendant can be taken to have confessed that the commissioners had no notice; for, the allegation of lands of which the commissioners had notice is one entire allegation, and the notice is not alleged as a substantive thing; and I do not think the dropping part of an allegation when the other part by that means becomes immaterial, is to be an admission of what is so dropped. But it may be said that the jury are at liberty to find facts which have been introduced into the pleadings, though they are not parcel of the issue: in many cases they may; but I doubt whether they can do so to cure an immaterial issue, when both parties have concurred in going to trial upon such an issue. After all it is an immaterial issue which I should be very glad if I could say that it could be helped; but I cannot. The issue in form is found for the defendant, and I see nothing to make the judgment vary from the verdict; which therefore I think should be entered for the defendant, and consequently that the judgment of the court of Common Pleas should be reversed.

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Lord Chief Baron ABINGER concurred in the judgment

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of the court of Common Pleas—holding that the seizure and sale by the commissioners of the property of the collector did not constitute a condition precedent to their right to put the bond in suit against the surety, unless notice were given to them of the existence of such property; and that, even with such notice, the statute 43 Geo. 3, c. 99, s. 52, allowed them to exercise their discretion in such seizure and sale.

First point:—
Opinion that the
sale of the lands
and goods of the
collector was a
condition prece-
dent to the com-
mencement of
an action against
the surety on
the bond.

Lord Chief Justice DENMAN.—The proviso in the 43 Geo. 3, c. 99, s. 13, admits of two constructions, either that, in an action against a surety, the plaintiffs shall not recover more than the amount of deficiency left after sale of the principal's property, if sold; or, that no action shall be maintained against the surety until such sale has been actually made. If the former construction prevail, I can discover no privilege that the surety obtains from the proviso, since the plaintiff never could have recovered more than was due at the time of bringing the action, in whatever manner the debt may have been reduced. It has not been contended that the meaning was to give the surety the benefit of any sale made pending the action: and, indeed, the language is wholly inappropriate to such a case. And, if sale were made pending the action, and produced a sum equal to the debt, all the costs would be incurred without necessity. The commissioners have been supposed to owe some duty to the surety which should lead them to sell for his benefit the collector's property: it has even been contended that a mandamus would lie to compel them to take that step for the purpose of reimbursing him. But I confess myself wholly unable to find anything in the statute to warrant such an opinion. The commissioners have no power to seize or sell except for payment of the debt due to themselves: when that is paid, their power is at an end. The act expressly requires them to pay the surplus, if any, not to the surety,

but to the collector. It has been also supposed that equity would compel the commissioners to act in some way for the benefit of the surety. On this point I will not venture to give an opinion: but I should think the same answer must apply. It is much more natural to my mind to believe that the legislature would afford a direct remedy by some clear enactment (though it may be susceptible of consequences not accurately foreseen), than that they should have intended to make them resort for the same purpose to a mandamus or a suit in Chancery. Either of these remedies would probably be more expensive and not more effectual than the common action for money paid, which the surety may certainly maintain. But the proviso, if construed in the other sense, affords him a substantial and a more reasonable benefit. And this appears to me to be the proper meaning of the words, which, though clumsily arranged, hold out to the surety a distinct promise to that effect. Suppose such words as these to have formed a part of the condition under which the bond was given—“Provided that this bond shall not be put in suit for any deficiency other than that which may remain after sale of the collector’s property;” I cannot conceive any reasonable man to doubt, that, in becoming a surety under such a restriction, he should not be sued till after such sale. Yet these words do not strike me as stronger than those employed in the proviso. If no bond can be put in suit against him but for an amount to be ascertained by another proceeding, surely an ordinary man would expect that proceeding to be taken before he was sued on his bond; especially as it might make an end of all claim upon him, by clearing off the whole debt, and leaving no deficiency. I cannot, therefore, feel the force of the argument drawn from the direction that the bond shall be prosecuted on any failure or default of the collector. This would have been the obligees’ duty without such direction; and even this must leave a certain discretion, otherwise the expense

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of a law-suit might often be incurred when there was an absolute certainty of speedy payment. But this direction to prosecute, though absolute in its terms, is immediately incumbered with the clause now under consideration, which is, not that the suit commenced shall go forward only to a certain result, but that no bond shall be put in suit for any deficiency other than that remaining after sale, that is, as I conceive, till such sale has been made and the deficiency ascertained.

The words of the proviso give rise to another argument, which to me appears more plausible. The sale is to be made in pursuance and by virtue of the directions and powers given to the commissioners by the act. We are thus driven to the 52nd section, by which the extraordinary power of summary seizure and sale is vested in the commissioners. They are authorized and empowered to seize, and, though at a later stage they are required to sell under the circumstances there described, they have a discretion in the first instance to seize or not. It is then argued, that, as no sale may ever take place in pursuance of the act, the surety cannot be entitled as of right to any advantages contingent upon a sale. But, upon reflection, this argument has led me to the more confident opinion of the correctness of the view I have taken: for, if, in the exercise of that discretion, the commissioners should decline to sell at all, then, though they should have notice of lands belonging to the collector far surpassing in value the debt due from him, the principal might be left in possession of them all, while the surety was compelled to pay his debt. I cannot consider this as by any means improbable, but quite the contrary. The commissioners are trustees, and bound to do their best for the interests confided to them; and I do not find that they are bound to any other duty. They might therefore, and, as prudent men, probably would, in many instances, proceed against a solvent surety, preferring so simple and complete a remedy to the difficult

and hazardous course of seizing property, subject to every variety of question as to value, title, and trusts, that may affect it. The proviso would therefore be merely illusory as a protection to the surety. On the other hand, these qualifying words—"by virtue and in pursuance of the directions and powers contained in this act"—would be a very vague and imperfect equivalent for—"if in their discretion they should think proper to sell;" and they are not without an appropriate meaning, the sale contemplated being that which the 52nd section authorizes. And the meaning of both sections together may I think be taken as thus addressed to the commissioners—"You are not compellable to sell: you may do so, or abstain from it, as you think proper: but, if the collector possess any property, you must seize and sell it before you put in suit the surety's bond."

The judgment delivered in the court of Common Pleas assumes that the sale of the collector's lands and goods may "form a condition precedent to the right to put the bond in suit against the surety:" and, in the case of *Pepper v. Cooper*, a plea similar to the present, except that it omitted the averment of notice, was pleaded in bar to an action brought against a collector's surety on his bond; the plea was held bad, because it referred to the property of another collector for whom the defendant was not surety. But the learned counsel for the plaintiff (the present Attorney General) did not bring forward the objection now raised, which would have gone to the root of the defence; nor does it appear to have occurred to the court of King's Bench. "He is not the collector," says Lord Tenterden, "contemplated by the act of parliament, *whose lands and goods must be sold before proceedings are had upon the bond against the surety.*" Mr. Justice Holroyd uses nearly the same words—"The collector contemplated by the act, *whose goods are to be sold previously to the bond being put in suit*, is the collector who has made default." As far as

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Second point.—
Opinion that
notice by the
surety to the
commissioners
of the existence
of lands and
goods belonging
to the collector,
was not neces-
sary.

these learned judges had considered this point, their impression clearly was, that the surety was protected from suit on his bond till the collector's goods had been sold.

Here, then, the second question arises—whether the suit against the surety is postponed to sale of the collector's property, or of such property only as the commissioners have notice of. One of the pleas (the fifth) alleges the collector to have had lands and goods within the jurisdiction, which might have been seized and sold, and of which the commissioners had notice. The replication denies this, involving notice as parcel of the issue tendered; and the rejoinder states that the collector had divers lands which the commissioners ought to have seized and sold, and that all the goods and chattels which could and ought to have been discovered and found were not seized and sold in manner and form &c., concluding to the country. And this was one of the issues tried by the jury, who found that the collector had lands and goods within the jurisdiction; that the commissioners had no notice of them; that they had reasonable grounds for believing that he had goods; and that they might have been seized and sold under the provisions of the act. In this state of the record, I am of opinion that the defendant is entitled to our judgment, on the broad ground that such notice appears to me to be immaterial.

On entering upon this argument, we must assume the former proposition to be decided in conformity with the view I have taken. And, if it be true that the surety's bond cannot be put in suit till after sale of the collector's property real and personal, I would ask, with all humility, and with the utmost respect to the court of Common Pleas, as well as to my Brethren here who agree with this part of their judgment, what judicial right exists to engraft another term on a parliamentary enactment. If the legislature has said that such property shall be sold before the bond is put in suit, how can the judges introduce a counter-proviso—"if the commissioners shall have received

notice of that property." The legislature knew how to express that limitation if contemplated, and to throw on any party the necessity of giving or of taking notice. If they had employed a term so ambiguous, without meaning any person, the judges might have found a difficulty in instructing a jury whether it implied knowledge distinctly imparted by one man to another (as in the case of notice of the dishonor of a bill of exchange), or mere knowledge of the fact; and, if the latter, much discussion might arise on the meaning of the word "knowledge." I agree that notice may be necessary, though not expressly required by the act of parliament; but I conceive that can only be where the party availing himself of a fact has obviously exclusive means of knowing it. But the act states no such case. The surety is interested, indeed, in conveying this knowledge; but, before I can say he is *bound* to do so, I must first be satisfied that he is bound to possess it. Before he becomes surety, a wise man will doubtless ascertain the amount of his principal's resources; but nothing binds him to do so: and, in truth, he generally enters into that relation from private friendship, with a general confidence in the integrity as well as the substance of the collector. The very first suspicion in his mind that anything is wrong, may be awakened by the process with which he is served in the suit on his bond. But he was informed by the act that that bond should never be put in suit till after sale of the collector's property by the commissioners. He may well suppose that they are bound to know the amount and the state of that property; for, they (elected from the same district) appoint him to the office, and are required by the act to exercise so constant a control over him that he can hardly be guilty of a default without some negligence in them. Perhaps the clause in question raises the strongest inference that the commissioners are bound to know the state of the collector's affairs; for, how otherwise could they exercise the discretion reposed in them, of selling or

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declining to sell? Those who are to seize and secure property wherever it can be discovered and found, are required, as it seems to me, to use due diligence towards making the discovery. If this plea, which I think good, though it unnecessarily avers notice, had exactly resembled that in *Pepper v. Cooper*, and the plaintiff had replied that the collector had no property which could be discovered or found, I should apprehend that the plaintiff might have rejoined that the commissioners had used no pains in searching for any. And if that issue had been joined on the present record, I conceive that the finding of the jury would clearly have entitled the defendant to judgment; for, a statement that the collector had property which might have been seized, and which they had good reason to believe that he possessed, is clearly equivalent to an assertion of negligence in their search. The only reason urged by the learned Chief Justice of the court of Common Pleas for requiring that the commissioners should be proved to have knowledge of the collector's property, does not appear to me by any means satisfactory—"A determination to the contrary would make it necessary for the commissioners to forbear so long to put the bond in suit, that all the benefit of it would in many cases be lost, both against the collector and the surety." I cannot conceive that this inconvenience could warrant us in supplying or varying any enactment whatever, and, least of all, in violating a direct engagement entered into by the public with the surety for one of its officers.

Being of this opinion on the principal matters debated, I need not declare any on the other points in dispute. My judgment is, that that of the court of Common Pleas ought to be reversed. But, as the majority of my Brethren, on various grounds, have come to a different conclusion, this court must declare that the judgment is affirmed.

Judgment affirmed.

IN THE COMMON PLEAS.

TRINITY TERM, 5 WILL. IV.

DAVIES and Wife, Demandants, WILLIAM SELBY
LOWNDES, Tenant.

THIS was a writ of right brought for the recovery of estates in the county of Buckingham. The writ was sued out on the 6th December, 1832.

The demandants Thomas Davies and Elizabeth his wife, by their count, demanded against William Selby Lowndes certain manors in the county of Buckingham, containing divers to wit five thousand acres of arable land, &c., and divers to wit five hundred messuages, five hundred buildings, &c., with the rights, members, and appurtenances to the said manors belonging; and also fifty other messuages, &c., with common of pasture thereunto

heir at law, his heirs, executors, administrators, or assigns, for ever, subject and chargeable with the payment of all my just debts, funeral charges, bonds, annuities, and all legacies herein-after mentioned [various legacies to relations on his mother's side]: all which debts, legacies, &c., I do hereby order and direct to be paid by *the said heir at law*, his heir, executor, or assigns, *within twelve months after my decease*; but, should it so happen that no heir at law is found, I do hereby constitute W. Lowndes, of &c., my lawful heir, on condition he changes his name to Selby: and I give the estates, and all the manors before mentioned, together with all rights &c. before mentioned, to the aforesaid W. Lowndes, subject to and chargeable with all the legacies, debts, &c. before mentioned:—Held, that, on failure of an heir of *the blood of the testator*, within the time limited for payment of the legacies, &c., the fee simple vested under this devise in W. Lowndes; and that the condition was satisfied by his changing his name to Selby within a reasonable time, and without a licence from the crown.

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Monday
& Tuesday,
Ap. 27th, 28th.

T. J. Selby, by his will devised as follows:—

"To my right and lawful heir at law (for the better finding out of whom, I direct advertisements to be published immediately after my decease in some of the public papers), all my manors, lands, &c., in B., to hold the aforesaid manors, &c., to my

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belonging and appertaining, situate and being in the several parishes of Whaddon, Great Horwood, Little Horwood, Tottenhoe, Shenley, Great Lynford, Mursley, and Bletchley, and the rectory of Tottenhoe, with the appurtenances, in the county of Buckingham, which the said Thomas Davies and Elizabeth claimed to be the right and inheritance of her the said Elizabeth, by writ of our lord the king of right; and thereupon they said that Thomas James Selby, deceased, whose heir the said Elizabeth is, was seised of the tenements aforesaid; with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the lord George the Third, late king of Great Britain, within sixty years next before the commencement of this suit, by taking the esplees thereof to the value of &c.: And the said Thomas Davies and Elizabeth his wife further said, that the said Thomas James Selby died so seised of the tenements aforesaid with the appurtenances, without leaving any heir, save and except Erasmus Lloyd thereafter mentioned; that the said Thomas James Selby was the son and heir of James Selby who died without any other issue of his body, and without having any heir save and except the said Thomas James Selby; that the said James Selby was the son and heir of James Selby, the grandfather of the said Thomas James Selby; and which said last-mentioned James Selby also died without having any heir save and except the first-mentioned James Selby, and which said James Selby secondly mentioned was the son and heir of Thomas Selby by Mary his wife, theretofore Mary Lloyd; and which said Thomas Selby died without other issue of his body, and without any other heir by the said Mary than the said James Selby secondly above named: And the said Thomas Davies and Elizabeth his wife further said that the said Mary, the mother of the said James Selby secondly above named, in her lifetime, and at the time of her death, was the daughter of Alban Lloyd and Mary his wife; that James Lloyd

was the son and heir of the said Alban Lloyd, by the said Mary his wife; and also the brother of the said Mary the wife of the said Thomas Selby; that Evan Lloyd was the son and heir of the said James Lloyd; that William Lloyd was the son and heir of the said Evan Lloyd; and that Erasmus Lloyd was the son of George Lloyd, who was the son of the said James Lloyd; and which said Erasmus was the cousin and heir of the said William Lloyd: and that, upon and at the time of the death of the said Thomas James Selby, who died so seised without issue as aforesaid, the right of the tenements aforesaid, with the appurtenances descended from the said Thomas James Selby to the said Erasmus Lloyd, as the cousin and heir as aforesaid of the said Thomas James Selby who died so seised as aforesaid: that, from the said Erasmus Lloyd, the right of the tenements aforesaid with the appurtenances, upon his death, descended to and upon John Lloyd as the son and heir of the said Erasmus Lloyd; and from the said John Lloyd the right of the said tenements with the appurtenances, upon his death, descended to Catherine, Frances, and one other Mary, as the daughters and co-heirs of the said John Lloyd; and from the said Catherine Lloyd, who married Thomas Julian, upon her death, all her part of and in the said right which came to her as co-heir as aforesaid descended to and upon the said Elizabeth, who was wife as aforesaid of the said Thomas Davies, as the daughter and heir of the said Catherine: and afterwards, upon the death of the said Frances, all her part of and in the said right which came to her as aforesaid descended to and upon the said last-mentioned Mary and Elizabeth as the sister and niece respectively and co-heirs of the said Thomas: and afterwards, upon the death of the said last-mentioned Mary, all her part of and in the said right which came to her as aforesaid, descended to and upon the said Elizabeth as the niece and co-heir of the said last-mentioned Mary;

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which said Elizabeth thereupon, and before the commencement of this suit, became and was entitled to the whole of the said tenements with the appurtenances as such heir and cousin of the said Thomas James Selby as aforesaid; and which said Thomas Davies and Elizabeth his wife now demand the same; and that such is their right, they offer &c.

Plea.

And the said W. S. Lowndes, by T. W., his attorney, comes and defends the right of the said T. Davies and Elizabeth his wife, and the seisin of the said Thomas James Selby when &c., and the whole &c., and whatsoever &c., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and right &c.; and he puts himself upon the grand assize of our lord the king, and prays a recognition to be made whether he the said W. S. Lowndes has a greater title to hold the tenements aforesaid, with the appurtenances, to him and his heirs, as he now holds the same, or whether the said T. Davies and Elizabeth his wife, the now demandants, have title to hold the said tenements, with the appurtenances, as they have above demanded the same &c. And the said T. Davies and Elizabeth his wife do the like. Therefore &c.

Issue.

On the trial of a writ of right, the demi-mark was tendered after the knights and several of the recognitors were sworn:—Held, in time.

The trial was had at bar on the 27th & 28th April, in this term. After the knights and two of the recognitors had been sworn, *The Attorney General*, on the part of the tenant, tendered the demi-mark (a). [*Tindal*, C. J.—That will only entitle the tenant to have the title of the demandants inquired into *in the course of the cause*.] *Talfourd*, Serjeant, for the demandants, objected that the tender was made too late: it should have been made before any of the knights were sworn. The objection, however, was overruled. The grand assize having been sworn in the usual

(a) As to the time for making the tender, and its effect when made, see the case of *Spire*, Dem., *Morris*, Ten., 3 M. & Scott, 118,

and *Carne*, Dem., *Nicoll*, Ten., ante, Vol. 1, p. 466, and the notes respectively appended to those two cases.

way, and the pleadings opened by *E. V. Williams*, for the demandants—

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The Attorney General (with whom were *F. Kelly* and *R. V. Richards*), for the tenant, proceeded to state the nature of his title:—The tenant claimed to hold the property in question under the will of Thomas James Selby, who was born in the year 1717, and died on the 7th December, 1772. Thomas James Selby was the only surviving child of Serjeant Selby, who died on the 29th of April, 1724, by his wife Mary Alston, daughter of Sir Rowland Alston, of Odell, in the county of Bedford. The Serjeant was the only son of James Selby of Wavendon (who died on the 27th of October, 1688), by Margaret Wells, daughter of John Wells of Wavendon. James Selby was the only son of Thomas Selby of Neverne, in the county of Pembroke, who came there a stranger, and died in December, 1684. The testator, Thomas James Selby, never was married; nor had he any relation that he knew, of the blood of the Selbys—he being only seven years of age on the death of his father. He had relations on the part of his mother and grandmother who were known to him—namely, Temperance Bedford and Ann Kent, the daughters of his first cousin, Temperance Alston, who married Arthur Bedford; and Ellen Wells, Catherine Franklyn, and Elizabeth Franklyn, grand-daughters and co-heiresses of Lionel Wells, the brother of Margaret Wells, the testator's paternal grandmother. Thomas James Selby, the testator, by his will, bearing date the 18th August, 1768, duly attested, gave and devised as follows:—"I give and devise to *my right and lawful heir at law* (for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the morning papers) all my manors of Whaddon and Nash, with all manors, rights, members, and appurtenances thereto belonging; also all my capital messuage

Will of T. J.
Selby.

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Devise to testa-
tor's heir at law,
chargeable with
debts &c.

Legacies.

Conditional de-
vise to W.
Lowndes, the
father of the
tenant.

known by the name of Whaddon Hall, and also divers parcels of lands inclosed, arable and meadow, situate, lying, and being in the parishes aforesaid, with all appurtenances thereto belonging; also all my chase known by the name of Whaddon Chase, with all the deer, soil, and ground, together with the timber and wood growing thereon; also all that coppice of wood being part of the same chase; also all that parcel of land known by the name of Whaddon Park; also all my other farms, messuages, lands, tenements, and premises situate in the several parishes of Whaddon and Nash, Great Horwood, Little Horwood, Singleborough, Tottenhoe otherwise Tatnall, Shenley, Mursley, Salden, and Bletchley, in the county of Buckingham, with all and every their rights,

members, and appurtenances: To hold the aforesaid manor, &c., to my *heir at law*, his heirs, executors, administrators, or assigns, for ever, subject and chargeable nevertheless with the payment of all my just debts, funeral charges, bonds, annuities, and all legacies hereinafter mentioned; that is to say, (amongst others)—to my cousin [by his mother's side] Temperance Bedford I give 1000*l.*, to Mr. Franklyn, who married Miss Elizabeth Wells, I give 1000*l.*, and to Miss Nelly Wells and Mrs. Franklyn (late Catherine Wells) I give 100*l.* each [his relatives on the part of his grandmother], to Mrs. Ann Kent, sister to Temperance Bedford before mentioned, 1000*l.*; all which debts, together with all which legacies, funeral charges, and appointments, I do hereby order and direct to be paid by the said heir at law, his heir, executor, or assigns, *within twelve months after my decease*: but, should it so happen that no heir at law is found, I then do hereby constitute and appoint William Lowndes, Esq., of Winslow, in the county of Buckingham, and now major in the militia [the father of the tenant, William Selby Lowndes,] my lawful heir, on condition he changes his name to Selby; and I give the estates and all the manors before mentioned, together

with all rights, hereditaments, members, and appurtenances before mentioned, to the aforesaid William Lowndes, subject to and chargeable nevertheless with all the legacies, annuities, debts, funeral charges, and other charges before mentioned: Next, I give and bequeath all my tenements or messuages, with their appurtenances thereto belonging, situate and being in St. Clement's Churchyard, in the parish of St. Clement's Danes, London; and also all those my messuages, farms, lands, and tenements, tithes, and hereditaments, and premises, with every of their appurtenances, situate, lying, and being in the Isle of Ely, in the county of Cambridge; and also all that my manor of Hertingfordbury, in the county of Hertford, with all rights, members, manors, and appurtenances thereto belonging, together with all farms, lands, tenements, and hereditaments whatsoever, to the Rev. John Lord and to Mr. Richard Filkes, their heirs, administrators, and assigns, in trust that they or the survivors of them, their heirs, executors, administrators, or assigns, do and shall, as soon as conveniently may be after my decease, sell and dispose thereof by public auction: [After directing the application of the money arising from the sale, the testator proceeds as follows:] Next, I give to my dear cousin Temperance Bedford, of Husborne Crawley, daughter of the late Arthur Bedford, minister of Sharnbrooke, before mentioned, 1000*l.* over and above what is before recited, this being part of my personal estate, together with all interest that is or shall become due, and which 1000*l.* is out at use and lent by me to Sir Thomas Alston, Bart., of Odell, in the county of Bedford; and I do also give and bequeath to the said Temperance Bedford the two pictures of my mother that hang up in my study; also the picture of my grandmother; also an iron chest now in the hands of Mr. Hoare, my banker, in Fleet Street, containing my mother's jewels and some other trifles; and also my mahogany chest of drawers in the dressing-room at Wandon, together with

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utors in trust.

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my mother's picture and other family pictures; together with all notes, bonds, monies, and whatsoever else is contained in the same: I also give to the aforesaid Temperance Bedford, her heirs, executors, administrators, and assigns, for ever, after the decease of my dearly beloved Mrs. Elizabeth Hone, commonly called or known by the name of Vane, all that my dwelling-house at Wavendon, together with all messuages, farms, lands, tenements, hereditaments, and premises, with their appurtenances, situate, lying, and being at Wavendon, otherwise Wandon aforesaid, Apsley Guise, Husborne Crawley, Heath, and Reach, in the several counties of Buckingham and Bedford: I do also give and bequeath to the said Temperance Bedford the perpetual advowson and disposal of the living or rectory of Wavendon aforesaid for ever, together with the tithes of all sorts thereof."

The Rev. John Lord, Richard Filkes, and Mrs. Elizabeth Hone, were appointed executors and executrix of this will.

Immediately after the death of the testator the whole of his property was placed under the protection of the court of Chancery. Advertisements were duly inserted in the newspapers, as directed by the will. Several persons thereupon claimed respectively to be heir to the testator; whereupon the Lord Chancellor appointed William Lowndes receiver, and permitted him to appear as defendant in such actions as were brought for the recovery of the premises. Amongst other claimants were the relatives of the testator on the side of his mother and also of his father's mother: but, inasmuch as they appeared from the will to have been well known to the testator, it was holden that they did not come within the description of heir at law, for whose discovery the testator directed advertisements to be published (*b*).

(*b*) The reporter has been favoured by Mr. Appleyard, the solicitor of the Lowndes family, with the following notes of the cases wherein the validity of this devise to William Lowndes was contested at law by

Four objections were taken to the demandant's right of recovery on the present occasion:—First—that, supposing they were of the blood of the Selbys, the claim was ad-

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persons claiming to be heirs *ex parte maternâ* of the testator; the one a trial at bar in the King's Bench of an action of ejectment in the time of Lord Mansfield, on the 20th of April, 1780; the other a second action of ejectment between the same parties in this court, tried before Lord Loughborough at the Lent Assizes for the county of Bucks, on the 1st June, 1781. On both which occasions the claimants were unsuccessful. They are taken from the short-hand notes of Mr. Gurney (the father of the present eminent professor of that art), corrected by Serjeants Hill and Rooke, who were of counsel in the respective causes.

First point.

DOE *d.* WELLS and Others v. WILLIAM LOWNDES.April 22nd,
1780.

Lord MANSFIELD summed up to the jury as follows:—The question is a question of construction, analogous to a question of identity; for, the whole turns on this—whom did the testator mean by “my rightful heir, whom I do not know—my right and lawful heir”? and it is very different from what the case would have been if he had said, I give to W. Lowndes my estate in case no heir is found; or, I give him the estate until an heir shall be found: then Mr. Lowndes could retain nothing if there were any one who could claim by descent. But that is not the case; for here is a gentleman who has estates purchased by his grandfather, estates purchased by his father, and estates purchased by himself; and all of them come within the local description that is the subject matter of this devise. An heir *ex parte paternâ*, an heir of the blood of the Selbys, would certainly take them all. But, suppose there is no heir upon the part of the father, and the estate is to go in descent on the part of the mother, grandmother, and great grandmother; who shall be his heirs, depends upon the title to the estate. If it be an estate purchased by himself, it goes one way; if purchased by his father, another way; if by the grandfather, it goes another way: because you must go a line back; for, the wife can never inherit to her husband, or anybody claiming under her. You must go back to get the blood. And, if that is the case, who is the person here described? for, here are three right and lawful heirs, when the rule of who is heir is taken from the subject matter. If I speak of an heir applied to Borough English lands, I speak of the youngest son: if I speak of an heir in Kent, gavelkind: if I speak of the heir general, or an heir in tail, they all take by description from the subject matter. But this testator describes a person to whom as his rightful heir he gives the whole. That places the court under the necessity of finding out a meaning for this expression—“rightful heir;” and that is to be collected from circumstances, just as if a father had two sons of the name of John, and left property to his son

Opinion of
Lord Mansfield
upon the con-
struction of the
will of T. J.
Selby.

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vanced at too late a period; the will directing the legacies to be paid within twelve months after the testator's de-

John; you must find out from collateral circumstances which he meant. Now, it strikes me this man meant an heir upon the part of his father; and that he should be of the name of Selby: and that appears from various circumstances. In the first place, it appears this gentleman's grandfather and a brother came into Buckinghamshire from the north country. They either did not know much of their families, or their families perhaps were so obscure and low they did not publish it in Buckinghamshire; but they rose to good circumstances and a certain degree of consequence in life. Then they rose much higher by means of the great fortune they acquired by the Serjeant. But the Serjeant had not traced back his pedigree in the north, and nobody was able strictly to find out what his family was, nor to whom they belonged. As to the testator Mr. Selby, he knows very well his relations upon the part of his mother; and he knows his relations upon the part of his grandmother, his grandfather's wife. But the heir in view, the object of his bounty, is a person he does not know—a person not found; but a person to find whom he desires advertisements to be put in the public papers. The relations he did know he did not mean to enjoy the estate if there was no heir preferable to Mr. Lowndes; for, he knows the Bedfords, he knows the Wellses, he knows the Alstons; he gives to some very bountiful legacies, and he gives to Mr. Lowndes the estate unless an heir shall be found. He describes Temperance Bedford by the terms of his "dear cousin;" he describes the plaintiffs who are now claiming, and he gives them all legacies; and it is admitted in the case he perfectly knew they were his relations. If any of these are his heir, he knew nothing of it, and supposes him a person yet to be found: and, unless that heir is found whom he knows nothing of, Lowndes is to have the estate. The inference is very strong, in my opinion, that he meant an heir upon the part of his father; and, unless an heir upon the part of his father was to be found—a person he did not know—he meant the estate should go to Mr. Lowndes. All the circumstances are admitted; therefore I do not know what to leave for you, but to find a verdict for the defendant.

The jury found for the defendant accordingly.

DOE & WELLS and Others v. WILLIAM LOWNDES.

June 1st,
1781.

THIS was another ejectment between the same parties for the recovery of the same premises, tried at the Lent Assizes for the county of Bucks, in the year 1781, when the jury returned a special verdict, setting forth (inter alia) the will of Thomas James Selby.

The judgment of the court of Common Pleas was delivered by Lord Chief Justice LOUGHBOROUGH, as follows:—

cease, out of the real estate: and therefore, it was contended, the testator must have intended the devise to

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On the part of the lessors of the plaintiff, it is contended, in the first place, that they are entitled to all the premises under the will, they being the persons described in that will under the denomination of the right and lawful heir of the testator. In the second place, it is contended, that, if they are not so entitled, yet they are entitled by descent to all the premises excepting the estate at Little Horwood, and the leasehold; that they take by descent as heirs at law, the limitation over to Mr. Lowndes being an executory devise, too remote, and therefore void.

This last point was started, and very ingeniously urged upon the second argument; and, at first view, perhaps, there is somewhat specious in it. I will take notice of it first, in order to lay it aside, because it appears to be merely specious. The argument upon that point proceeds thus:—There is in this will a devise to the right and lawful heir and his heirs. There is then a devise to William Lowndes and his heirs. This latter devise, it is contended, cannot take effect as a vested estate, because it would be a fee upon a fee: it must therefore be executory; and, if it is executory, it is too remote, for the commencement of it is indefinite. The whole of this argument seems to me to be an obvious fallacy. It is said that there is a devise here to the right and lawful heir and his heirs. It is true that there is a clause in the will respecting the disposition of the estate prior to the devise to William Lowndes; but whether in that clause of the will there is contained a devise of the estate or not, is the very question in the cause. If the person to whom the estate is given under that clause is ascertained, then it is very clear that no estate is given to William Lowndes—not because the devise to him is too remote, but because upon that supposition there is nothing given to him. The prior devise, as it is a little improperly called in the argument, is to a person not named, but described; whose existence is doubtful, but is not eventual. Whether at the death of the testator, there doth or not exist a person to whom the description applies, is a certain though it is an unknown fact. If there does exist such a person, nothing is given to Mr. Lowndes; if there does not, the estate vests immediately in Mr. Lowndes: therefore there is no objection to the legality of the devise to Mr. Lowndes in the creation of that devise. Whether it obtains in his favour or not, may not be exactly known at the death of the testator; but it is absolutely certain, if there is a person answering to the description of that clause prior to the nomination to Mr. Lowndes, that person takes, and Mr. Lowndes never can take. On the other hand, if there is no such person as answers to that description, Mr. Lowndes takes, and the estate vests in him. Neither would it make void the devise to Lowndes, though it were admitted in the argument, and though it were expressed in the will, that the purpose of inserting his name in the will

Second point—
disposing of the
objection that
the limitation
over to Lowndes
was an execu-
tory devise, too
remote, and
therefore void.

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William Lowndes to become absolute and indefeasible unless the right heir should make his appearance before

was to prevent an escheat. The authorities upon that point cited by Mr. Serjeant Hill are all true. It is true that no estate can be created by a will that is against the rules of law; but there are no rules of law that either by will or deed a grantee or feoffee should not take against the lord.

First point—
upon the con-
struction of the
will.

The case, then, comes entirely to depend upon the first question, and that is, whether the lessors of the plaintiff are entitled to take under the description of right and lawful heir of the testator, Thomas James Selby. But, before I come to consider the parts of the will from whence the exposition of these words is argued upon the other side, it may be proper to observe that the common topic of argument from the favour due to the heir at law, is totally inapplicable to the present case. The lessors of the plaintiff are relations to the testator, but they do not claim by descent: in this case they certainly have no legal right to the leasehold estate, and they have as little right to one part of the freehold, a small part indeed; but still a part of that which is comprised in the general devise: they, as well as the defendant, Mr. Lowndes, claim and can only claim under the will. When, therefore, they introduce themselves as claimants under the will, it is not just reasoning to talk of the favour that is due to heirs at law. But, perhaps, it would not be quite fair to dismiss this topic without a little more observation upon it. It is an established rule laid down in many and very antient authorities, that an heir at law is not to be disinherited without express words, necessary implication, or declaration plain. The foundation of the rule is obvious and plain. The right of the heir by descent is certain, and therefore he is not to be disinherited: and the rule always speaks of an heir in the character of heir and taking by descent. The law gives an estate to the heir, if there is no other person to take it; and he who claims in opposition to that clear, undoubted, and certain right, must shew a better title: therefore, no doubtful, no ambiguous, and no uncertain interest shall take away the clear right of the heir at law.

An heir at law
is not to be dis-
inherited with-
out express
words, neces-
sary implica-
tion, or declara-
tion plain.

As to whether
any of the con-
tending parties
stand in the si-
tuation of heir
at law claiming
by descent.

Let us consider, then, in the present case, whether there are any of the contending parties that stand in the situation of the heir at law claiming by descent. Here is a will produced, to which both parties resort: in that will the name of William Lowndes is found; and there can be no hesitation as to his identity. The only question is, whether the three lessors of the plaintiff, Elizabeth Wells and the two Franklyns, are described in the devise antecedent to the devise to Lowndes. Unless their title can be made out clear, Lowndes's title is clear and certain upon the will. Upon examining the argument upon the interpretation of the clause, we must allow that they are relations, and that they are relations capable of succeeding, and that therefore they are entitled that no words shall be strained or forced to exclude them.

the expiration of the year; or at all events within a reasonable time, which could not be extended beyond the

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Dem.
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Tcn.

On the part of the lessors of the plaintiffs, the great argument—for, all that was urged in the case results to this argument, and supports one or other of the propositions contained in it—the great argument was this: the testator, it is said, was ignorant who personally was his heir; he was even ignorant to what relation, by the rules of succession, the character of heir would belong: but, whoever the persons, and whatever their right, the testator meant to describe their legal title; and his intention was, that the law should name his heir. Upon this proposition, the whole of the plaintiff's case depends, and it will be necessary to examine the several parts of it. That the testator was ignorant of who personally was his heir—that he did not know the individual or individuals who were to succeed in that character—is certainly true; and I take it to be the only certain part of this argument. I rather believe that the testator did not know that there might be some possible relation whose claim would extend to all the lands that either he, his father, or his grandfather, had acquired, whose right he meant to preserve, to whom it might be necessary to give the leasehold estate, and whom he likewise sought to charge with the legacies. The words he has used are certainly but ill adapted to convey that idea; for, a person that I have described would be a person of the blood of the Selbys, who would succeed to the entire estate, whether descended from the grandfather, the father, or of his own purchase, and would be the general representative of that family which he wished to establish. But this I state only as a matter of conjecture. I hold it to be certain that the testator did not know who the person was; for, he directed means to be used to find out the person. I do not hold it to be certain that the testator was ignorant what right the law threw upon particular classes of relations. But I take it to be by no means true that the testator meant that the law should name his heir; for, I think it is as plain as it can be made by any instrument, that the testator has with great anxiety endeavoured to guard against this. One observation on the whole will is, that the idea of family is very strongly marked; continuing the name, and being represented in his possessions, and in his seat in the country: and throughout the whole of the will it certainly would be straining exceedingly, and not only straining but obliterating a great deal of it, to suppose that in this instrument the least idea prevailed of an intestacy. The law, if the testator meant to refer himself to the law, undoubtedly would name in direct opposition to that which is his manifest intent: the law would sever that property which he wished to unite: the law would, for instance, take an acre from the park, and give it to different persons; the law would sever the fish-ponds, for they are upon the leasehold premises: the law would disunite the farm, which it is manifest it was his object and intent to keep united in one

Ignorance of
the testator as
to who was his
heir.

Anxiety of testator to continue his name.

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Lessors of the
plaintiff claim-
ing as heirs on
the part of the
grandmother.

year 1783, the date of the decrees in Chancery hereinafter mentioned.

hand, viz. the person who was to be his representative. Another thing is extremely strong upon that part of the case. The lessors of the plaintiff come here as heirs at law upon the part of the grandmother: they come to claim under the description in the will all that is comprised in the devise. The foundation of their title is, that they are so related as to be his heirs at law on the part of the grandmother: but it is obvious that there is another person to whom a part of the premises comprised in this devise must exactly upon the same proposition and the same argument belong, because they are not heirs at law of the grandfather, and to that part of the estate which descends from the grandfather they can set up no title. What becomes of that part of the estate? Does it escheat? Will Mr. Lowndes take it, if Mr. Lowndes stands in the place of that heir at law of the grandfather who would take the whole of the estate? The value of those premises is small: but the value of them does not at all alter the argument if he stands in the place of the heir at law with regard to that part of the premises. Then, there are two parties—the heirs at law on the part of the grandmother, who say, His estate belongs to us, because, if there had been no will, it would descend to us—on the other hand, there stands Mr. Lowndes, claiming the other part of the estate. The lessors of the plaintiff say they are entitled to it. Why so? Only because the greater part of the estate is of that nature, that, if there had been no will, it would have descended to them. Is it to be in average between them when there are two persons whose claims are thus equally balanced, and who neither could qualify any right with respect to the leasehold estate? Upon what ground is the court to say it shall go in average between them?

The words
"right and
lawful heir at
law" applicable
only to an heir
of the blood of
Selby.

Upon all these observations, it seems, therefore, that in this will "right and lawful heir at law" cannot possibly mean *every* heir at law. It is contended that it would be the heir on the part of the father, though the heir on the part of the mother would be nearer related to the testator. Why? Not because the heir of the mother could not be entitled to take by any course of legal descent. Is it more applicable to the heir on the part of the grandmother? The heir on the part of the grandmother is just as much excluded from claiming any part of the estate which comes from the paternal grandfather, as the heir on the part of the mother is precluded from claiming any part of the estate which came from the father. The only person to whom this description seems in all its parts applicable, is, the heir on the part of the paternal line—the heir of the blood of Selby, who would be, in the common and ordinary acceptation of the word, in the general sense of the country, the representative of the family of the Selbys; in whose favour it is probable the testator meant that this devise should operate, and for whom he meant to keep the

Secondly—That Elizabeth Davies was not even heir at law in the more extended sense of the term; she claiming

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leasehold estates connected with the freehold, and charged the payment of the debts and legacies out of the estate. I say no more than that it is probable, because it is not necessary to carry that argument further; for, it must not be forgotten that the lessors of the plaintiff are now called to maintain their right; that they must shew against a clear and specific devise to a person named, of whose identity there can be no doubt, that they come under the words of the will; and, in my apprehension, the argument that is attempted to support their case does not make it out with clearness, with certainty, and with that conviction that is necessary to establish a title against another which undoubtedly is clear.

However, the defendant's counsel do not leave the matter upon the imperfection of the argument urged on behalf of the lessors of the plaintiff; for, they undertake to shew, on the behalf of the defendant, negatively, that the lessors of the plaintiff cannot be the persons meant in this will; and there are two circumstances by which they contend that that proposition is made out with a very strong degree of evidence. In the first place, they say (and nothing can be more certain) that the person to whom the testator meant to apply the description of "right and lawful heir at law," was one whose person was unknown to him; for, he directs that advertisements should be published immediately after his decease, for the better finding out of that person. Then, he is there describing one of whose possible existence he had some idea, but of whose actual existence he knew nothing. Now that, they say, never can apply to the lessors of the plaintiff, because the lessors of the plaintiff he undoubtedly knew, and one of them, Elizabeth Wells, is mentioned by name in the will; and though the names of the other two are not mentioned, yet their mother's name is mentioned. Their father is described, and described by the circumstance that explains his connection with the testator: he is described as the husband of Elizabeth. The female who is in the same degree with them, and married a person of the name of Franklyn, is also named in the will. The object of the inquiry the testator directed to be made was, not to ascertain a point of law, but to discover an unknown person: and it would be ridiculous to suppose he had directed advertisements to find out that which he extremely well knew. The object therefore of this description must be some other person than those who were before his eyes and whom he names. When the testator comes to make a devise in favour of Lowndes, he takes care and is anxious that Lowndes should assume the name of Selby: there is a positive direction in the will that Lowndes, whenever he becomes entitled, shall take the name of Selby. Now, if the testator could have conceived that there was any event in which Elizabeth Wells and the Franklyns might be entitled to claim under the will, it is inconceivable that he who

The heir contemplated by the testator a person unknown to him.

The lessors of the plaintiff, on the other hand, well known to him.

Lowndes required to assume the name of Selby.

No such provision as to the present claimants.

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from the testator's paternal great-grandmother, whereas there are still existing heirs on the part of the paternal grandmother. Although the authorities upon this point are conflicting, yet the weight of them greatly preponder-

Legacies to
Elizabeth Wells
and to the
Franklyns,
charged upon
the estate—

to be paid with-
in twelve
months, by the
heir at law—

failing whom,
by W. Lowndes.

Probable con-
jecture not to
prevail against
a clear title.

was anxious to make a gentleman abandon his own name, should not be equally anxious to make those assume that name under which he intended the representation of his family should continue. But, besides this, there is another circumstance in the will which the defendant's counsel contend (and, it seems to me, unanswerably) makes it still more clear that the testator, negatively, did not intend that the lessors of the plaintiff should be the representatives of his family in possession of his estate, managing that estate, and of course as heirs of that estate by the will executing his will with regard to that estate. To Elizabeth Wells and to the Franklyns there are two legacies given; those legacies are charged upon this estate. The mere circumstance of giving legacies charged upon an estate will not perhaps of itself be sufficient to shew that the legatees could not in any event take the estate out of which the legacies are to issue. But this is not all: the testator has proceeded to give several legacies, and directs that they shall be paid within twelve months, which is the usual time at which legacies are made payable; he directs that they shall be paid by his heir at law within a twelvemonth after his decease; but, if it should so happen that no heir at law should be found, he then appoints Mr. Lowndes his lawful heir, upon condition that he changes his name; and he gives him the estate charged with those legacies. It is clear, therefore, that the testator supposed a case in which Mr. Lowndes might be the person to pay the legacies to Wells and to the Franklyns. Now, that case could not by possibility exist, if Wells and the Franklyns were the persons to answer the description of his right and lawful heir; because they would take the estate; the estate would not come to Mr. Lowndes; and Mr. Lowndes therefore could never be in the situation which the testator has supposed to be a situation likely to happen within a short compass of time. From these circumstances, the counsel for the defendant contend (and their argument seems to me well-founded) that there is sufficient evidence to shew negatively that the heir could not be the lessors of the plaintiff. The other part of the argument seems to me to shew that the lessors of the plaintiff have not been successful to make out the point that they are the persons intended: the utmost of the argument would be probable conjecture, not very certain, and which, in such a case, ought not to prevail against a clear title. Mr. Lowndes's title is a clear one, unless another be found to bar it: therefore the court, upon the whole, are of opinion that judgment ought to be for the defendant.

Judgment for the defendant.

ates in favour of the right of the heir of the paternal grandmother, in preference to the claim of an heir on the part of the paternal great-grandmother: Mr. Justice Manwood (in *Clere v. Brook*, Plowd. 450), Sir Matthew Hale (History of the Common Law, 240, 244), Lord Bacon (Maxims of the Law, 37), and Lord Chief Baron Gilbert (Bac. Abr. *Descent*, B.), holding that the issue of the paternal grandmother's father shall inherit before the issue of the paternal grandmother's maternal grandfather; contrary to the opinion of Mr. Justice Blackstone—2 Bl. Comm. Book 2, Ch. 14.

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Thirdly—That, as Elizabeth Davies was not of the blood of the Selbys, she was not the right and lawful heir the testator had in his contemplation, who alone could defeat the claim of William Lowndes; that the manifest and primary object of the testator was to preserve his name; that his intention clearly was that the heir at law spoken of by him must be of the name and blood of Selby, the will containing no direction for the heir at law to assume that name, but such direction being confined to William Lowndes; and that the testator's intention being clear to exclude from the title of his heir at law his relations on the part of his grandmother, of whose existence he was cognisant (as was evidenced by his having given legacies to them), a fortiori he must have intended equally to exclude an heir on the part of his paternal great-grandmother. In support of this position, the judgments of Lords Mansfield and Loughborough in the cases before referred to, were relied upon. Third point.

Fourthly—That a fine which had been levied by the devisee, William Lowndes, in Trinity Term, 1780, operated as a complete bar to any subsequent claims in respect of the property—the possession of William Lowndes being then, by virtue of the decree of the 28th March, 1783, adverse. Fourth point.

The will of Thomas James Selby having been produced,

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Mr. Appleyard, the attorney for the Lowndes family, proved that the tenant was the son and heir of the devisee mentioned in the will, who died in the year 1813. He produced the court rolls of the manor of Whaddon, whence it appeared that William Lowndes had been in possession from the year 1772 or 1773, holding courts in that name down to the 14th November, 1781; that, in November, 1783, a court was held by him in the name of William Lowndes Selby; and that, from that time until his decease, the courts had been held in the name of William Selby. But it did not appear that he had ever obtained an act of parliament or the king's license or sign-manual for changing his name.

Decree of 23
April, 1779.

A clerk of Mr. Appleyard then produced the proceedings in Chancery; consisting of (amongst other things) a decree dated the 23rd April, 1779, upon a bill filed in Easter Term, 1778, by Mrs. Hone, the executrix named in the will of the testator, against William Lowndes and the several persons who had then set up claims to the property, and also upon a bill filed in October, 1773, by Lowndes against Samuel Thorne, Margaret Wells, and all others who up to that time had made any claim to the estates. By this decree, the bills were ordered to be taken pro confesso against certain of the defendants who did not appear—to be retained for twelve months—and that, in the meantime, the claimants under Margaret Wells should be at liberty to bring an action of ejectment to recover possession of the premises—See the report, ante, p. 81, n.

Final decree, 28
March, 1783.

By a final decree in these two causes, made on the 28th March, 1783, which operated upon all the claims then set up, the Lord Chancellor (amongst other things) declared the will of the testator well proved, and that the same ought to be established and the trusts thereof performed and carried into execution, and his lordship ordered that the same should be performed and carried into execution accordingly: And it was further ordered that

what was then already reported due for principal and interest of the testator's debts and legacies, and the subsequent interest to be computed thereon (except the legacies of 1000*l.* each given to John Lord and Richard Filkes, his executors), should be raised by mortgage or sale of the testator's said estate subjected to the payment thereof by his will, or of a sufficient part thereof, with the approbation of the Master, and as he should direct; and that all proper parties should join in such mortgage or sale as the Master should direct: And it was further ordered that 22,658*l.* 18*s.*, Bank Three per cent. Annuities, standing in the name of the accountant-general, in trust in the said causes, under the title of "Hone and Medcraft, and Lowndes and Wells," which had arisen from the rents and profits of the manor, park, tithes, and other estates at Whaddon, and were paid into the Bank by the said William Lowndes Selby, the receiver, should be transferred to the said William Lowndes Selby—the parties having agreed to settle the proportions thereof belonging to them respectively between themselves: And it was declared that the manor of Whaddon and Nash, and other the premises devised by the said will to William Lowndes Selby, were to be considered as belonging to the said William Lowndes Selby; and it was ordered that he should be let into the possession thereof, and that all the title-deeds and writings relating to the said estates should be also delivered to him: And it was further declared that the devises in the said testator's will of the several freehold and leasehold estates thereby given to charities were void devises, as being within the meaning of the 9 Geo. 2, c. 37; that such leasehold estates should fall into and constitute part of the general residue of the testator's personal estate; that the title-deeds and writings of the testator's estate lying in St. Clement's Churchyard in the county of *Middlesex*, and at Hertingfordbury in the county of *Hertford*, should be delivered to the defendant Sir Rowland

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Alston, who had recovered possession thereof; and that the title-deeds and writings of the estates purchased by the testator after the making of his will, should be delivered to the defendants Ellen Wells and Henrietta Franklyn and Elizabeth Franklyn, who had recovered the possession thereof.

On the trial of a writ of right, decrees in Chancery in causes between the tenant's father and other persons not connected with the demandants, and to which proceedings the latter were neither parties nor privies, were admitted for the purpose of shewing the character in which the tenant's father held the premises.

On the part of the demandants, *Talfourd*, Serjeant, and Sir *W. Follett* objected to the reception of the above decrees, on the ground that the demandants were not parties or privies to the proceedings, nor at all connected with or claiming under any of the parties, but claiming by title paramount; and that the proceedings might have been altogether collusive, and had for the mere purpose of frustrating the present claim.

The Attorney-General, contra, submitted that the decrees in question were admissible, not as binding upon the demandants, but for the purpose of shewing in what character and capacity William Lowndes was in possession of the property—viz. first, as receiver, and afterwards as the right owner, as devisee under the will of Thomas James Selby.

Talfourd, Serjeant.—The evidence offered on the part of the tenant shews that William Lowndes, prior to the date of these decrees, held manor courts as lord in his own right. The tenant ought not to be permitted thus to give a character to that possession: the decrees shew him to have been in as receiver or trustee for the heir at law until he should be found.

TINDAL, C. J.—I think there can be no valid objection to the admissibility of these decrees, if insisted upon; though I must confess I do not see the value of the evidence when admitted. They are not binding upon the

demandants, nor conclusive as to the right; they can only shew the character under which William Lowndes entered into possession at the time; that they are *res inter alios gesta*, is therefore no objection to their reception. Writs and judgments in actions against third persons are frequently admitted for the purpose of shewing the character in which an act was done (as, that the sheriff entered under the writ, and the like), or the amount of damage the plaintiff has sustained.

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The rest of the court concurring—

The decrees were read.

On the cross-examination of the witness who produced the decree of March 28th, 1783, it appeared from the bill and answer therein set forth that the testator's death took place on the 7th December, 1772; and that he was at the time of his death seised of the property in question. [This was the only proof as to that fact, save an extract from the registry of his burial, which appeared to have taken place at Wavendon on the 14th of December, 1772.]

Proof of the
death of the
testator.

The title deeds were then put in—consisting of deeds bearing date respectively the 20th March, 1653, the 19th November, 1653, the 29th December, 1653, and the 10th December, 1655, relating to property at Wavendon acquired by James Selby, the testator's grandfather; the last being the settlement made on his marriage with Margaret Wells, which took place on the 11th December, 1655: deeds of the 2nd April, 1696, the 5th January, 1698, the 15th September, 1702, and the 11th April, 1715, relating to property acquired by Serjeant Selby, the testator's father; the last being the settlement made upon his marriage with Mary the daughter of Sir Rowland Alston, which took place on the 21st April, 1715: the will of Serjeant Selby, dated the 10th March, 1723, probate of which was granted on the 6th July, 1724, reciting that the

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Serjeant had one son and only child, and giving small legacies to his brother and sister Selby, and to his sister Langston: and also deeds dated the 14th July, 1761, and the 25th November, 1763, relating to lands acquired by the testator. On the part of the tenant was then put in the deed to lead the uses of a fine levied by the tenant's father, bearing date the 23rd April, 1784, wherein he was described as "William Selby, lately called William Lowndes," and in which deed the property in question was properly described; together with an examined copy of the chirograph, of Easter Term, 24 Geo. 3, with the proclamations indorsed thereon. The daughter of Temperance Bedford, who was called as a witness, proved that her mother was first cousin of Sir Rowland Alston, whose daughter married the testator's father.

The case for the tenant being closed—

First point.

Talfourd, Serjeant, on the part of the demandants, in answer to the objections urged by the Attorney-General, for the tenant, submitted—1. The primary object the testator had in view was the discovery of his heir at law. It is not very reasonable to presume the implied intention of the testator to be that such heir at law should prosecute his claim within twelve months after his decease, seeing that the testator himself in the course of a long life was unable to discover the existence of such person. Had it been so intended, it might easily have been expressed. That the debts and legacies were to be paid within twelve months affords no conclusive argument in favour of this construction, inasmuch as the heir when found would be bound by any acts done by the receiver, William Lowndes, for the purpose of carrying into effect this part of the will. And no such point appears to have suggested itself in either of the manuscript cases to which the Attorney-General has referred.

2. Then it is said that the present demandant Elizabeth Davies is not even the heir general of the testator, inasmuch as she claims through his great-grandmother, and, according to the rule laid down in *Clere v. Brook*, the blood relations on the part of the grandmother are to be preferred. The authority relied on for this position (though adopted as it undoubtedly has been by some very great lawyers) is a mere obiter dictum of Mr. Justice Manwood, which is successfully combated by Mr. Justice Blackstone, whose opinion is supported by the late statute, 3 & 4 Will. 4, c. 106, s. 8, which enacts and *declares*, "that, where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants." At all events, this objection does not apply to that part of the estate that was purchased by Serjeant Selby, the grandfather.

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Second point.

3. The devise to the testator's right and lawful heir at law being expressed in general and unqualified words, the effect of that devise is not to be restricted or destroyed by the arbitrary interpolation of words calculated to confine its meaning to an heir of the blood of the testator; the cases upon which this assumption rests have never been published; and therefore, though determined by judges of considerable eminence, yet they have never been in a condition to receive the sanction of subsequent tribunals.

Third point.

4. As to the fine—A fine and five years' non-claim constitutes a legal bar, because the party assumes to be pos-

Fourth point.

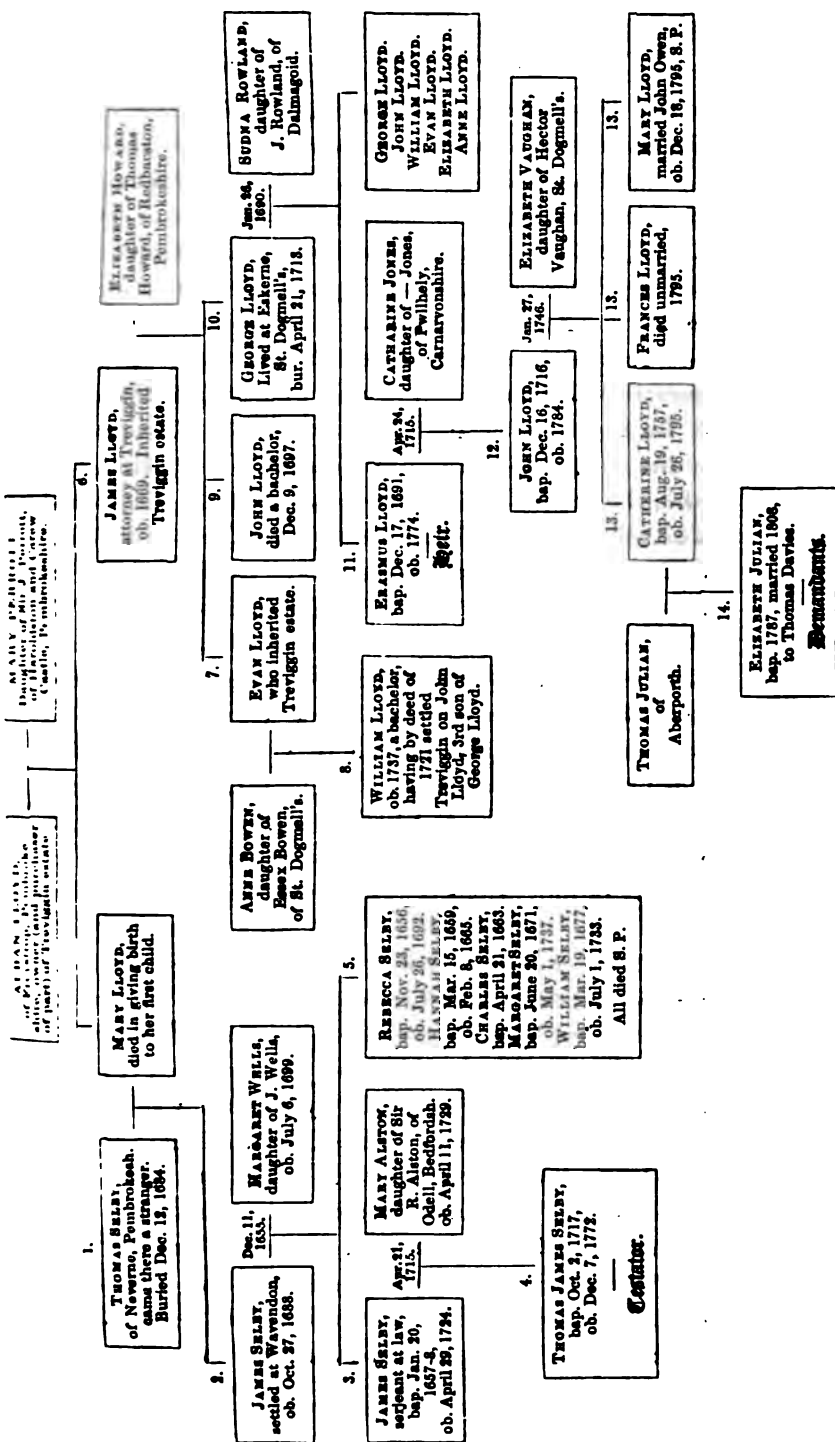
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essed in his own right, and because the fine is supposed to operate a notice to all the world. It is therefore important that this notice should be most complete; and, consequently, that the individual by whom the fine is levied should do it in his own proper name. Here, however, the fine is levied by one who appears to have been let into possession as a mere trustee, and who is found, from the year 1774 to the beginning of 1783, holding manorial courts in the name of William Lowndes, and at the end of 1783, in the name of William Lowndes Selby, and who, in the deed to lead the uses, describes himself simply as William Selby; and it nowhere appears that this individual ever had in due manner acquired the right so to describe himself. The fine, therefore, is deficient in every requisite to its validity.

TINDAL, C. J., here intimated to the demandants' counsel that the court were prepared to decide against them upon the construction of the will, and suggested that proof of the demandants' pedigree would be superfluous.

Talfourd, Serjeant, stating that he should tender a bill of exceptions, the court directed him to proceed.

The demandants' pedigree was then proved as follows:—The proper evidence was adduced of the respective births, marriages, and deaths of the parties therein named; except that as to Charles Selby, the third son of James Selby of Wavendon, and brother of Serjeant Selby, the only proof of his death without leaving issue prior to the decease of the Serjeant, was, an examined copy of a decretal order made in a suit between Thomas James Selby (the testator) and his aunt Margaret Langston (formerly Selby) respecting the personal property of William Selby, by which it appeared that those two individuals were the only parties living entitled to distribution.



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The only evidence (beyond tradition and the doubtful testimony of some old witnesses and of an antient Welsh pedigree of the Lloyd family) to shew the connection between the Lloyds and the Selbys, consisted of the will of one James Lloyd, of Monington, in the county of Pembroke (described in the pedigree as an "attorney at Treviggin"), who died in 1669. The will bore date the 3rd September, 1669, and contained, amongst other things, the following bequest:—"To James Selby, of Wavendon, in the county of Buckingham, *the son and only issue of Thomas Selby, of Neverne, in this countie, by my sister Mary, his deceased wife*, the sum of fortie pounds of current English money." The will likewise contained a bequest of 4*d.* to the cathedral of St. David's; 2*d.* to the church of Monington; and 2*d.* to the poor of the parish: the testator's messuage and lands in Dogmells were devised to his son and heir, Evan, charged with a payment to his two brothers of eight score pounds, being four score pounds a year to each; to his wife, during her widowhood, he devised the moiety of his messuages and lands in Monington; and all his personal estate to his son Evan, who was appointed executor, to pay debts and legacies. Annexed to the will was an inventory of the chattels of the testator, the whole of which amounted in value to 39*l.*

This will was produced by Thomas Jones, registrar of the diocese of St. David's, from the Consistory Court of Carmarthen. Jones proved that about fifteen years ago he had diligently searched amongst the muniments there for this document (being employed by a party who then set up a claim), but without success; that, about four years ago, he was told that it had been found there, and went to see it; that the muniment room was accessible to other persons than the registrar—to the witness amongst others, which he accounted for by stating that he had formerly been employed there for several years as deputy registrar. The index produced from the same place was found to contain

a reference to the will of one James Lloyd of Monington who died in 1669. A gentleman of great experience in the translation of old records and writings stated that the document in question (the will of James Lloyd) had all the appearance of a document of about the date it purported to bear, though some of the letters, and even entire words, were in the characters used at the present day, a fact which he described as being by no means uncommon.

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The Attorney-General, in reply.—Admitting the demandants' pedigree to have been substantially proved, yet there is no evidence whatever, entitled to a moment's consideration, to shew any connection between the Lloyds and the Selbys. All that the demandants rely upon for this purpose is the supposed will of James Lloyd of Monington, which certainly has anything but the appearance of a document adapted to and made for the mere purposes of an ordinary will. The clause describing James Selby, the testator's grandfather, is suspiciously particular, being, as it is, precisely adapted to the purposes of the present claimants, and produced from what must appear to be at best very irregular custody. And it is not a little to be wondered at, that a document of such remarkable importance should have so long evaded the strict scrutiny of the several parties by whom the right to this property has been contested.

Reply.

TINDAL, C. J., in his summing up, addressed the Grand Assize to the following effect:—You are summoned to determine by your recognition whether William Selby Lowndes, the tenant, hath more mere right to hold the property in question than the demandants, Thomas Davies and Elizabeth his wife (in right of the latter), have to demand the same. The demandants contend that Elizabeth Davies is the heir at law of Thomas James Selby,

Summing up.

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the person last seised. The tenant claims as son and heir of his father William Lowndes, the devisee named in the will of Thomas James Selby, bearing date the 18th of August, 1768. Two questions therefore principally arise—one a question of fact, which is entirely for your consideration—the other a question of law for the consideration of the court, in the determination of which you will be guided by the direction the court will give you. It is clearly established that Thomas James Selby, the testator, was seised of the property in question, and that he died so seised on the 7th December, 1772. At the time when this writ of right was issued, the period fixed by the law as the limit for the suing out of such writs was sixty years: the writ in the present case appears to have issued on the 6th of December, 1832—a few hours before the time when the right of the demandants (supposing it to have existed at any time) would have been barred for ever.

As to the pedigree.

The first question, then, will be, whether or not the demandants have succeeded in proving their pedigree as alleged in their count. I must confess that I see no objection to it either in the ascending or descending line: the only doubt is as to the proof of the connecting link, *vis.* whether or not James Selby of Wavendon was the son of Thomas Selby of Neverne, by Mary Lloyd, his wife, the sister of James Lloyd of Treviggin. This it appears is the only connection between the Selbys and the Lloyds. Of the marriage there is no doubt in this case: but the question is whether James Selby of Wavendon was the son of that marriage. If you are not satisfied with the evidence adduced by the demandants for the purpose of establishing this point, your recognition will be for the tenant. But, supposing the demandants to have established to your satisfaction the claim of Elizabeth Davies as heir at law of Thomas James Selby, the individual last seised of the property in question, if he by a will duly executed has diverted the property into a channel different from the ordinary legal course of descent, in that case also you

will find for the tenant. There is also a collateral point set up by the tenant as a legal bar to the claim of the demandants, viz. that William Lowndes, the father of the tenant, in the year 1784, being then in possession of the property, and claiming title thereto, levied a fine with proclamations, and that the time allowed by law (five years) had passed without any claim being made to bar the effect of that fine. Upon this point the only question for your consideration will be, what was the character in which William Lowndes held the property at the time the fine was levied—whether he held as receiver (as is suggested on the part of the demandants), or as a trustee for others; or whether he held it under a claim of absolute right in himself. [His lordship here recapitulated the evidence as applicable to the several points above mentioned, and then proceeded as follows]:—If you are satisfied that the demandants have succeeded in establishing their pedigree, it becomes my duty to state to you the opinion of the court as to the legal operation and effect of the devise of Thomas James Selby and of the fine levied by William Lowndes. The will bears date the 18th August, 1768: the testator died on the 7th December, 1772. The question is, what estate did William Lowndes take under this will. We are of opinion that the devise was one which, under the circumstances that have happened, vested the fee simple in William Lowndes, the devisee. It appears that, at the time he made this will, the testator had long outlived both his father (the Serjeant) and his mother—the former having died when he was about four years old, the latter when he was about eleven. The testator, therefore, probably had no opportunity of knowing anything of the state of his family. It is impossible to read the will without coming to the conclusion that the testator was ignorant of the existence of any heir of his own name or of his father's family. Such being the case, he devises as follows:—"I give and devise to *my right and lawful heir at law* (for the better

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As to the fine.

Will of T. J.
Selby.

Testator's ignorance of the state of his father's family.

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The heir contemplated by the testator, an heir of the blood of the Selbys.

Conditional devise to W. Lowndes.

Testator's knowledge of the state of his mother's and grandmother's family.

finding out of whom I direct advertisements to be published immediately after my decease in some of the morning papers) all my manors of Whaddon and Nash, with all manors, rights, members, and appurtenances thereto belonging," &c. The first question that presents itself here is, What did the testator mean by "my right and lawful heir at law?" Taken in their general and unrestricted sense, these words would embrace any heir whatever, either ex parte paterna or ex parte materna, in any degree however remote. But we think they are by the declared intention of the testator manifestly limited and cut down to an heir of the blood of the Selbys. If he had intended his heir general to take, the devise would have been wholly unnecessary; the law would have implied it. The devise is made subject to and chargeable with debts, legacies, &c., which the testator directs to be paid by his heir at law within twelve months after his decease. He then proceeds thus:—"But, should it so happen that no heir at law is found, I then do hereby constitute and appoint William Lowndes, Esq., of Winslow, in the county of Buckingham (the father of the tenant), my lawful heir, on condition he changes his name to Selby; and I give the estates and all the manors before mentioned, together with all rights &c. before mentioned, to the aforesaid William Lowndes, subject to and chargeable nevertheless with all the legacies, annuities, debts, &c., before mentioned." This brings us very far to the conclusion that the testator contemplated an heir of the name and blood of the Selbys; for, in the event of no heir at law being found, he constitutes a stranger to the family his lawful heir, he taking the name of Selby. In further support of the inference we draw from this form of devise, it is to be observed that the testator was cognisant of the fact of the existence of persons some one of whom would be in the larger and more general sense of the word his heir. He gives legacies to Temperance Bedford and Ann Kent, his cousins by his mother's side,

and to certain other persons, his relations on the part of his grandmother. He also gives Temperance Bedford an advowson in the county of Bucks; and yet in this devise he passes her by, plainly intimating that she is not of the class amongst which we are to look for the heir at law intended, and that the person he had in view was an heir of the blood of the Selbys. There is, too, something singular in the terms of the devise to William Lowndes. The testator appoints him in a very unusual way his heir at law—making him, after the fashion of the old Roman law, a sort of adopted heir—as one standing in loco hæredis, unless the right heir originally contemplated by the testator should be discovered. Added to this, certain duties are cast upon the heir, such as the payment of debts, legacies, and annuities, &c., charged upon the estate, which renders it necessary that the devisee should take the fee. How are we to suppose that the testator meant the devise to be ambulatory for a period of sixty years—the construction contended for on the part of the demandants? Looking, therefore, at these indications on the part of the testator that the large and comprehensive terms used in the will should be thus restricted, we are of opinion that the heir at law of whom mention is first made in the will, is an heir of the blood of the Selbys; and that, no such heir having been found, the devise to William Lowndes was a good and valid devise.—Two points have been urged on the part of the demandants into which I shall not now enter—the one, as to whether or not, under the terms of this will, the heir at law whose claim was to operate so as to destroy the effect of the devise to William Lowndes, was bound to make his claim within twelve months after the testator's death, the period within which the debts and legacies were to be paid—the other, as to whether the rule of descent laid down by Mr. Justice Manwood in the case of *Clere v. Brook*, and recognized and adopted by the very high legal authorities that have been referred to in

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Duties cast
upon the heir.

As to the period
at which the
devise was to
take effect.

As to the rule
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As to the validity of the fine.

the course of the argument of the Attorney-General in this case, is to be preferred to that which Mr. Justice Blackstone adopts (postponing the class No. 11 to No. 10), and so learnedly enforces, in the second volume of his Commentaries, Book 2, Ch. 14. Such a discussion would here be out of place.—Then, as to the validity of the fine levied in the year 1784. It appears from the evidence, that, from the death of the testator in 1772, down to the year 1783, various proceedings were had in the court of Chancery relative to this property; and that pending those proceedings William Lowndes, the father of the tenant, and the devisee named in the will of Thomas James Selby, was appointed receiver; that, previously to the making of the final decree in the equity suits, the courts held by the devisee as lord of the manor of Whaddon, were held by him in his own name of William Lowndes; and that, after the date of that decree, the courts were held either in the name of William Lowndes Selby, or William Selby. The effect of the decree was, to put William Lowndes into possession of the premises in question as devisee; and from that time to the present he and his heir (the now tenant) have been in the actual receipt of the rents and profits. Upon this part of the case, therefore, the only question of fact for your consideration is, whether William Lowndes, at the time of levying the fine, viz. in 1784, was in possession and in receipt of the rents and profits, claiming the same in his own right, or as a mere receiver. I must confess that I have seen no evidence to support the latter proposition. He appears to have taken possession and to have received the rents and profits in his own name and to have appropriated them as his own right. This being so, the fine is a good and valid fine in a court of law, whether the fee was at that time in him rightfully or wrongfully. Even if William Lowndes held as trustee at the time, I am not prepared to hold that the fine would not be good; for, we could not, I think, in a court of law,

say that the party to the fine had nothing in the lands. How a court of equity would deal with it is another question. A fine duly levied, with proclamations, and five years' non-claim, constitutes a bar against all the world. If therefore this was a valid fine, that alone will entitle the tenant to a recognition in his favour.

The devise to William Lowndes was made subject to a condition that he should change his name to Selby: and it has been asked by one of the Grand Assize whether, in order to bring himself within the condition, it should not be made to appear that William Lowndes did, either by act of parliament or the royal sign manual, so change his name. Upon this point, the evidence is, that, whilst the proceedings were going on in chancery, Lowndes did not adopt the name of Selby; but that he did so after the date of the final decree which gave him the possession of the property. There is nothing in the will that requires the change in the name to be made within any precise time: neither does the law point out any mode by which such change is to be effected (c). It is true that it is by no means an uncommon thing for parties, in order to give a greater apparent sanction and a more extensive notoriety to the fact, to obtain a royal license for changing their names. But it is not absolutely necessary: a party may (no fraud being contemplated) adopt a name, and work his way in the world with it as well as he can, without doing any formal act. That Mr. Lowndes, therefore, failed to obtain the king's license for using the name of Selby, is not an objection that can avail on the present occasion. Besides, it is an objection that is out of court if the fine of

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Not necessary that Lowndes should have obtained a royal license for changing his name to Selby; nor that he should have changed it within a definite period.

(c) A person taking a name by act of parliament does not lose his original name, and might take a legacy by it: the effect of the king's license is only permission to use a name, not imposing it—*Leigh v.*

Leigh, 15 Ves. 100. And see *Doe d. Luscombe v. Yates*, 5 B. & Ald. 544, where the voluntary assumption of a name was held sufficient to prevent a forfeiture.

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As to the proof
of the deman-
dant's pedigree.

1784 was properly levied, or if the demandants have failed in the proof of their pedigree; and it is equally out of court if the construction we have put upon the will be the true one. The principal fact for your consideration is, whether or not the pedigree of the demandants has been proved; if you think it has not, then your recognition will be for the tenant: if, on the other hand, you are of opinion that the pedigree is made out, still upon the points of law that have been raised on the part of the tenant, and which I have endeavoured to explain to you, and in the consideration of which you will no doubt be guided by the court, the tenant will also be entitled to your verdict.

Tender of bill
of exceptions—
1. to the con-
struction put by
the court upon
the—2. to the
ruling as to the
effect of the fine.

Talfourd, Serjeant, on the part of the demandants, tendered a bill of exceptions. The grounds of exception were—first, to the construction put by the court upon the will; the demandants contending that the testator meant the devise to operate in favour of his heir general—secondly, to the ruling of the court as to the effect of the fine—thirdly, to the reception of the decree of March 28th, 1783.

TINDAL, C. J.—It is too late to object to the admissibility of the decree: the demandants made use of it for the purpose of shewing the seisin of the testator within sixty years.

No special ver-
dict in a writ of
right.

It was proposed to take the opinion of the jury upon the specific points: but the demandants' counsel objected that it could not be done—it being admitted that in a writ of right there cannot be a special verdict. The Grand Assize retired for about half an hour. On their return, the Lord Chief Justice asked if they were agreed as to the pedigree: but they declined to answer the question, and returned a general verdict for the tenant.

Verdict for the Tenant.

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CURSHAM and Others v. NEWLAND and Others,
and

FALCON and Wife v. NEWLAND and Others.

Thursday,
April 30th.

THE following case was, under the direction of His Honor, the Master of the Rolls, submitted for the opinion of this court:—

Richard Merricks, the testator in the pleadings in these causes named, made his will, which was duly executed and attested, in the following terms:—Whereas I am seised in fee simple and inheritance of all that undivided third part of certain messuages, lands, tenements, hereditaments, and premises situate in the parish of Hellingly, in the county of Sussex (near the church there), which are now in the occupation of my nephew B. W. Gilbert, or his under tenants or assigns; now I do hereby give and devise the said messuages, lands, tenements, hereditaments, and premises, unto and to the use of my nephews B. W. Gilbert and G. F. Gilbert and their assigns respectively during their natural lives and the life of the longest liver of them; and, after the determination of those estates, by forfeiture or otherwise, in the lifetime of my said nephews or the survivor of them, to the use of my trustees, W. C. Newland, W. W. Holland, and H. Hall, and the survivors and survivor of them, and the heirs of such survivor, during the natural life of my said nephews and the life of the survivor—upon trust to preserve the uses hereinafter limited from being defeated, and for that purpose to make entries and bring actions as occasion shall require; but nevertheless to permit and suffer my said nephews or their assigns, and the survivor of them and his assigns, to take the rents, issues, and profits of the same premises during their natural

Testator devised the residue of his freehold, copyhold, and leasehold estates, &c., to his wife for life; and from and immediately after her decease to his son and daughters, naming them, "and their lawful issue respectively, in tail general, with benefit of survivorship to and amongst the issue respectively, as tenants in common, and not as joint tenants:"—Held, that the children of the testator took estates for their respective lives, as tenants in common, in the freehold and copyhold lands, and the grandchildren contingent remainders in tail general by purchase in the shares of their respective parents in the same lands, with cross-remainders in tail among such grandchildren respectively, and cross-remainders in tail

among their parents—the testator having used the words "*issue of child or children*" as synonymous with "*sons or daughters of a child or children*;" and that the children and grandchildren respectively took corresponding interests in the leaseholds.

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lives and the life of the longest liver of them, to and for their and his absolute use; and, from and after the decease of my said nephews and the survivor of them, to the use of all and every the lawful children of them my said nephews, and to their heirs and assigns for ever, as tenants in common and not as joint tenants; and, in case there shall be only one such child, then to such only child, and his or her heirs and assigns for ever; but, in the event of there being no such child, or, there being children of my said nephews or such only child, and they or he or she dying in the lifetime of the said B. W. Gilbert and G. F. Gilbert or the survivor of them, without leaving lawful issue, then, from and after the decease of the said B. W. Gilbert and G. F. Gilbert, and the decease of the survivor of them, I give and devise all the aforesaid messuages, lands, tenements, hereditaments, and premises, with their appurtenances, to and for the same uses, ends, intents, and purposes as I have hereinafter directed as to the disposal of my residuary real and personal estate and effects. Item—I do hereby direct that my said trustees, the said W. C. Newland, W. W. Holland, and H. Hall, do and shall within three calendar months after my decease lay out and invest in their names in some of the government stocks and funds in England the sum of 4000*l.* sterling, and stand possessed of the stocks and funds so purchased upon the trusts following, that is to say, upon trust that they my said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall pay to my son Richard Merricks, or permit and suffer him from time to time as the same shall become due to receive, all the interest and dividends arising from the said trust stocks and funds, during his natural life, for his use; and, from and after his decease, in case my said son shall intermarry with any wife and shall leave her him surviving, upon further trust to pay or permit and suffer such wife of my said son R. Merricks who shall so survive him to receive

and take the dividends and interest accruing from the said trust stock to and for her own use during her natural life; and, from and after the decease of the survivor of them my said son R. Merricks and of any wife he may leave him surviving, then upon trust to pay the principal of the said trust monies, stocks, or funds in equal shares and proportions unto and amongst all and every the children of my said son R. Merricks lawfully begotten who shall live to attain the age of twenty-one years, being a son or sons, or, being a daughter, shall live to attain that age or be married with the consent of her parents or guardians, and, if there shall be only one child of my said son who, being a son, shall live to attain the said age, or, being a daughter, shall attain the said age or be married with such consent as aforesaid, then upon trust to pay, assign, or transfer the whole of the said trust stocks or funds to such only child for his or her own use and benefit absolutely; but, in case my said son R. Merricks shall happen to die without leaving lawful issue, or, leaving lawful issue, such issue, being a son, shall not live to attain the age of twenty-one years, or, being a daughter, shall not attain that age or be married as aforesaid, then upon trust immediately after the decease of my said son R. Merricks and of any wife with whom he may have intermarried, and of the survivor of them, to pay, assign, and transfer the said principal trust stock and funds in equal shares and proportions between and amongst my four daughters, Elizabeth the wife of G. Buckton the younger, Louisa Merricks, Susanna W. Merricks, and Harriet Merricks, who shall be then living, or to the lawful issue of such of them as shall be then dead, such issue taking the part or share which their, his, or her mother would have been entitled to had she been then living, such share to be equally divided in equal parts and proportions amongst the children of such of my daughters who shall be then dead if more than one, and, if but one, then the whole of such my deceased daughter's share shall

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go and be paid to such only child; and, if neither of my said daughters shall be then living at the decease of my said son R. Merricks and his wife without leaving lawful issue as aforesaid, then I direct that the whole of the said trust stocks and funds shall be divided between and amongst all my grandchildren being children of my aforesaid daughters equally between them. Item—I do hereby further order and direct that my aforesaid trustees or the survivor of them, and the executors and administrators of such survivor, do and shall within the like space of three calendar months after my decease in like manner lay out and invest in their names in some of the government stocks or funds in England the three several further sums of 3000*l.*, 3000*l.*, and 3000*l.*, sterling, in trust for the use and benefit of my said daughters, Louisa Merricks, Susanna W. Merricks, and Harriet Merricks respectively, and their respective issue lawfully begotten, upon exactly the same trusts, and to and for the same ends, intents, and purposes with regard to my said daughters, Louisa Merricks, Susanna W. Merricks, and Harriet Merricks, and any husbands they may leave them surviving, and the lawful issue of them my said daughters respectively, with remainder over, on failure of issue, to my said son and my other daughters and their issue, as are heretofore declared with respect to the said sum of 4000*l.* hereinbefore directed to be laid out for the benefit of my said son Richard Merricks and any wife and issue he may leave. Item—I do hereby likewise order and direct that my aforesaid trustees, or the survivor of them, and the executors or administrators of such survivor, do and shall, within the like space of three calendar months after my decease, in like manner lay out and invest in their names in some of the government stocks or funds aforesaid the further sum of 1000*l.* sterling, in trust for my said daughter Elizabeth the wife of the said G. Buckton, for the separate use and benefit of her my said daughter Elizabeth Buckton and of

her issue lawfully begotten, upon exactly the same trusts, and to and for the same ends, intents, and purposes as to her husband and issue, and with remainder over on failure of issue to my said son and other daughters and their issue, as hereinbefore declared and expressed as to the several sums hereinbefore directed to be invested and paid for my said son and other daughters respectively as aforesaid. Item—I give, devise, and bequeath all the rest of my freehold, copyhold, and leasehold estates, with all my household goods, plate, linen, china, and all other my real and personal estate, with their appurtenances, according to the nature and quality of such estates respectively, to my dear wife Elizabeth Merricks for her own absolute use and benefit for and during the term of her natural life; and, from and immediately after her decease, unto my said son and daughters Richard Merricks, Elizabeth the wife of the said G. Buckton, Louisa Merricks, Susanna W. Merricks, and Harriet Merricks, and their lawful *issue* respectively, in tail general, with benefit of survivorship to and amongst their *issue* respectively, as *tenants in common*, and not as joint tenants: Provided always that such issue not to have a vested interest until they attain the age of twenty-one years, being sons, and, being daughters, until they shall attain that age or be married; but, during the minority of the said issue of my said son and daughters respectively, I do hereby authorize my said trustees, or the survivors or survivor of them, or the heirs of such survivor, after the death of either my said son or daughters respectively, to apply the whole or any part of the rents, issues, and profits of the said estates, and not exceeding the interest of the presumptive share of each child therein, for and towards his, her, or their maintenance, education, and advancement in life during minority: and, in case my said son and daughters, or any or either of them, shall die in my lifetime, or after my decease without leaving lawful issue, or with lawful issue, and such issue, being a son or

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sons, shall not live to attain the age of twenty-one years, or, being a daughter or daughters, shall not live to attain that age or be married—then the part or share or parts or shares of him, her, or them so dying to be for the benefit of the survivors and their issue, in the same manner as their original parts and shares are hereinbefore given to them respectively as aforesaid. Item—I do hereby make, constitute, nominate, and appoint the said W. C. Newland, W. W. Holland, and H. Hall, executors of this my will: Provided and my will is, that my said trustees and executors hereinbefore named, and the survivors and survivor of them, and the executors and administrators of such survivor, shall and may at all times in the first place reimburse and indemnify themselves and himself respectively all such costs, charges, damages, and expenses, as they or either of them shall or may at any time expend, lay out, and be put unto for or by reason or means of all, any, or either of the trusts hereby in them reposed, and that neither of them shall be answerable for any loss which may happen to any of the said trust premises, unless such loss happen through his or their wilful neglect or default, nor one for the other or others of them; nor for more monies than shall actually come to each of their hands respectively; but each and every of them for his and their own acts, deeds, receipts, neglects, and defaults only; nor for any loss which shall or may happen by occasion of depositing any money in the hands, keeping, or custody of any public or common banker: and I do hereby revoke, annul, and make void all former and other wills by me at any time heretofore made, and do declare these presents only to be and contain my last will and testament. In witness &c.

The testator departed this life on the 26th June, 1822. The said B. W. Gilbert has one child only—the defendant Thomas Gilbert. The said G. F. Gilbert never has had any child. The said Richard Merricks, the testator's son, has never had any child. The said Louisa Cursham, now

Louisa Falcon, one of the plaintiffs, never had any child. The said Elizabeth Buckton, one of the defendants, has seven children, that is to say, the said E. M. Buckton, G. B. Buckton, M. L. Buckton, F. Buckton, A. Buckton, and W. M. Buckton, all of whom are infants under the age of twenty-one years. The devisee for life, Elizabeth Merriks, died in April, 1825.

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The question for the opinion of the Court was—What estates the children took in the freehold, copyhold, and leasehold lands respectively; and whether the grandchildren took by purchase any and what estates in the same lands respectively, or any of them.

The case was argued in Easter Term last.

Preston (Wigram was with him), for the plaintiffs.—Under this will, though expressed in very inaccurate terms, it must be held that the children take estates tail in the freehold and copyhold estates, with cross-remainders over between them, and the grandchildren contingent remainders in tail general by purchase, with cross-remainders in tail among them; and that they all take corresponding interests in the leaseholds. The devise is to the widow for life—“and, from and after her decease, unto my said son and daughters (naming them) and their lawful *issue* respectively (Had it stopped there, consistently with all the cases, beginning *King v. Melling*, 1 Vent. 214, 225, the children would have taken estates tail), in *tail general*, with benefit of survivorship to and amongst the *issue* respectively, as tenants in common, and not as joint tenants.” It is clear that either the parents or the children were intended to take estates tail; and, undoubtedly, the words used will admit of either mode of reading—whether the tenancy in common is to begin with the parents or the children, is ambiguous. If the words “with benefit of survivorship to and amongst the *issue* respectively,” &c., are to be confined to the children taking by purchase,

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great confusion will be produced, and the evident intention of the testator defeated. Issue is a very comprehensive term, and, unless cut down by the express words of the will to issue in the first degree, includes grandchildren. To hold that the estates tail first vested in the grandchildren, would render it impossible to work out the cross-remainders between them consistently with the intention of the testator. In order to give effect to the general intention, the courts will always violate or discard particular expressions in a will—*King v. Birchell*, Amb. 378, 1 Eden, 424, *Roe d. Dodson v. Grew*, 2 Wils. 322, *Mogg v. Mogg*, 1 Meriv. 654, *Doe d. Cock v. Cooper*, 1 East, 229, *Frank v. Stovin*, 3 East, 548, *Murthwaite v. Jenkinson*, 2 B. & C. 350, 3 D. & R. 764, *Frankland v. Glynn*, 2 Bligh, 59, n.

Teed, for the defendants.—It is perfectly clear, from the language adopted by the testator in reference to the disposition of the 4000*l.*, that he used the words “issue” and “children” as convertible terms: the word “issue” in the residuary clause must therefore be taken as a word of purchase. In *Sibley v. Perry*, 7 Ves. 522, and in *Hampson v. Brandwood*, 1 Madd. 381, the words “issue” was held to be confined to children, upon the construction of wills very similar to the present. In order to construe this will according to the manifest intention of the testator, it is perfectly clear that the children must be held to take as tenants in common for life, with contingent remainders in their respective shares to the grandchildren, by purchase, as tenants in common in tail, with cross-remainders between the grandchildren; and corresponding interests respectively in the leaseholds.

Preston was heard in reply.

The following certificate was afterwards sent to the Master of the Rolls:—

" We have heard this case argued by counsel, and considered it, and we are of opinion that the children of the testator took estates for their respective lives as tenants in common in the freehold and copyhold lands devised by the residuary clause of the will, and the grandchildren contingent remainders in tail general by purchase in the shares of their respective parents in the same lands, with cross-remainders in tail among such grandchildren respectively, and cross-remainders in tail among their parents; the testator having, in our opinion, used the words ' issue of child or children ' as synonymous with ' sons or daughters of a child or children ; ' and that the children and grandchildren respectively took corresponding interests in the leaseholds.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

J. B. BOSANQUET."

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SAME v. SAME.

THE devise to the trustees was in a second case stated as follows—the facts being in other respects the same as in the preceding case:—

" I give and bequeath to each of my executors and trustees hereinafter mentioned the sum of 50*l.* for the

April 30th.

Testator devised to W. N., W. H., and H. H., and the survivors and survivor of them, and the heirs of such survivor, upon trust to the use of his nephews and their

assigns during their lives and the life of the longest liver of them; and, after the determination of those estates by forfeiture or otherwise in the lifetime of his nephews or the survivor of them, to the use of the trustees &c. during the natural lives of his nephews and the life of the survivor, upon trust to preserve the uses thereafter limited from being defeated; but nevertheless to permit and suffer the nephews to take the rents &c. for their own use: and, from and after the decease of the testator's nephews, to the use of their children, their heirs and assigns, as tenants in common, and if only one child, to such child, his or her heirs and assigns for ever: but, in the event of there being no such child, or, there being children of the nephews or such only child, and they or he or she dying in the lifetime of the nephews or the survivor of them without leaving lawful issue, then, from and after the decease of the nephews and the survivor of them—to the trustees and the survivor of them, their heirs and assigns, upon the like trusts, and to and for the same uses, &c., as directed as to the disposal of the testator's residuary real and personal estates and effects [for which see the last case]:—Held, that, under this devise, the trustees took an estate in fee in the freehold and copyhold lands, and an absolute interest in the leaseholds.

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trouble they may have in performing this my will, and discharging the trusts thereof. I give and devise my messuages, lands, tenements, hereditaments, and premises at Hellingly unto W. C. Newland, W. W. Holland, and the Rev. H. Hall, (my executors hereinafter named), and the survivors and survivor of them, and the heirs of such survivor, upon trust to the use of my nephews B. W. Gilbert and G. F. Gilbert and their assigns respectively, during their natural lives and the life of the longest liver of them; and after the determination of those estates, by forfeiture or otherwise, in the lifetime of my said nephews, or the survivor of them, to the use of my said trustees and the survivors or survivor of them, and the heirs of such survivor, during the natural lives of my said nephews, and the life of the survivor, upon trust to preserve the uses hereinafter limited from being defeated; and, for that purpose, to make entries and bring actions as occasion shall require; but nevertheless to permit and suffer my said nephews or their assigns, and the survivor of them and his assigns, to take the rents, issues, and profits of the same premises during their natural lives and the life of the longest liver of them, to and for their and his absolute use; and from and after the decease of my said nephews, and the survivor of them, to the use of all and every the lawful children of them my said nephews, and to their heirs and assigns for ever, as tenants in common, and not as joint tenants; and, in case there shall be only one such child, then to such only child, and his or her heirs and assigns for ever; but, in the event of there being no such child, or, there being children of my said nephews or such only child, and they or he or she dying in the lifetime of the said B. W. Gilbert and G. F. Gilbert, or the survivor of them, without leaving lawful issue, then, from and after the decease of the said B. W. Gilbert and G. F. Gilbert, and the decease of the survivor of them, I give and devise all the aforesaid messuages, lands, tenements, hereditaments, and premises,

with the appurtenances, unto my said trustees and the survivor of them, their heirs and assigns, and the heirs and assigns of the survivor of them, upon the like trusts and to and for the same uses, ends, intents, and purposes as I have hereinafter directed as to the disposal of my residuary real and personal estate and effects."

The question for the opinion of the court was—Whether the trustees took any and what estate in the freehold, copyhold, and leasehold lands respectively, or any of them; and also what estate the children took in the same lands respectively; and whether the grandchildren took by purchase any and what estate in the same lands respectively, or any of them.

Preston, for the trustees, contended, upon the authority of *Doe d. Keen v. Walbank*, 2 B. & Ad. 554, that the fee in the freehold and copyhold lands must under this devise be held to pass to the trustees, to enable them to carry into effect the intentions of the testator: otherwise the contingent remainders would be defeated.

Teed was heard on the other side: but, the question being really unimportant to the parties, it was but slightly argued.

The following certificate was afterwards sent to the Master of the Rolls:—

"We have heard this case argued, and considered it, and are of opinion that the trustees took an estate in fee in the freehold and copyhold lands devised by the residuary clause, and an absolute interest in the leaseholds.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

J. B. BOSANQUET."

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HENRY MILLER, Demandant, MARY MILLER, Widow,
Tenant.

In a writ of right, the summons for the knights to elect the assize was tested on the 10th April, returnable on the 20th. After the delivery of the writ of summons to the sheriff, but before the knights had been actually summoned, the demandant's attorney, finding that the 20th April was not a juridical day (it being one of the Easter holidays), and that there were not fifteen days between the teste and return of the writ of summons, got it back from the sheriff, altered the return to the 24th April, and procured it to be resealed, and gave notice to the tenant's attorney that the knights were summoned for the 24th:—Held, no ground for setting aside the writ of summons.

The objection was first taken on the 24th April, as the knights were about to be sworn. The court directed the tenant to make a substantive motion on the subject. The motion was not made until the 12th May:—Tindal, C. J., and Park, J., seemed to think the motion too late. The rest of the court intimated no opinion on this point.

THIS was of a writ of right. The writ of summons was tested on the 10th April, returnable on the 20th: the issue was delivered on the 14th, with notice to the tenant that the knights were summoned to appear in court on the 20th, to elect the assize. By the 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, it is provided "that, if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter day shall fall within Easter Term, there shall be no sittings in banc on any such intervening days (a)." The 20th April being one of the days thus withdrawn from the term, and the demandant's attorney discovering that there were not fifteen days between the teste and return of the summons, got back the writ and altered the return from the 20th to the 24th, procured it to be resealed, and then gave notice to the tenant that the knights were summoned for the last-mentioned day. This alteration in the writ of summons was made after it had been delivered to the sheriff, but before the knights had been actually summoned. The knights accordingly appeared in court on the 24th April, when—

Bompas, Serjeant, before they were sworn, objected that they were not duly summoned—the alteration of the

(a) And by Reg. Gen., Easter Term, 2 Will. 4, it is ordered "that the days between the Thursday next before and the Wednesday next after Easter Day, shall not be reckoned or included in any

rules or notices or other proceedings, except notices of trial and notices of inquiry, in any of the courts of law at Westminster."

And see Reg. Gen., Hilary Term, 6 Will. 4, post.

writ of summons being the unauthorized act of the party, and an act that under any circumstances, according to the established practice, the court could not allow. He cited *Brocas v. The Mayor &c London*, Str. 235, and was proceeding with his argument, when the Court intimated that the more convenient course would be, to make a substantive motion upon the subject.

The knights were sworn, and the trial at bar appointed for the 1st June.

Bompas, Serjeant, now moved for a rule calling upon the demandant to shew cause why the writ of summons and all subsequent proceedings should not be set aside for irregularity.—He submitted that the first writ of summons was irregular, inasmuch as it was made returnable on a day on which the court could not sit; that the second writ (if any) was likewise irregular, it having been issued on a dies non (*Luke v. Harris*, 2 W. Bl. 1261 (b), and it not being competent to either party in a real action to take a step in the absence of the other; that the amendment of the first writ was equally an irregularity, the writ of summons being a judicial writ, and therefore not amendable at all—Booth on Real Actions, 96—*Adams v. Railway*, 1 Marsh. 602—2 Wms. Saund. 45 l.

Busby, for the demandant, before shewing cause, objected that the tenant was not properly described in the affidavit upon which the motion was founded—her addition of “widow” being omitted, and the affidavit contra disclosing the fact of two individuals named Mary Miller

the deponent was described as of “Lawrence Pountney, in the city of London,” without stating whether parish, place, or lane:—Held, sufficient.

(b) See *Hanson v. Shackelton*, 4 Dowl. P. C. 48, where it was held that a writ of summons dated on Sunday is a nullity, and the objec-

tion is not waived by lapse of time; and that the court is bound to take judicial notice that a particular day of the month falls on a Sunday.

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MILLER
Dem.
MILLER
Ten.

Tuesday,
May 12th.

Thursday,
May 28th.

The addition of “widow” to the name of a party in the title of a cause is not necessary. In an affidavit used in shewing cause against a rule,

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 {
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residing in the premises, the one a married woman, the other a widow; and also that the deponent in the same affidavit was described as of "Lawrence Pountney, in the City of London," without describing the place as vill, parish, place, street, or lane, &c.: the motion being *strictissimi juris*, he submitted that the tenant ought to have come with proper materials.

Bompas, Serjeant, contra. [He was relieved from the last objection—the court holding that the deponent's place of abode sufficiently appeared.]—It was not necessary to describe the tenant at all in the affidavit: and it is not shewn that there is any other person who could be sued as Mary Miller, for, Mary Miller the married woman could not be sued alone. Besides, the title of the affidavit depends on an arbitrary rule of the court, which applies only to the Christian and surname; and "widow" or "esquire" forms no essential part of the description of the person.

TINDAL, C. J.—I am aware of no case where the rule has gone further than to require the Christian and surnames of the parties to be stated in the title of the cause. The addition of widow can no more be necessary than those of spinster, bachelor, merchant, &c. The rest of the court concurring—

Busby proceeded to shew cause.—The objection is taken at too late a period. The tenant was aware of the existence of the supposed irregularity at all events on the 20th April, and took no notice of it until the 24th; and then, being put by the court to a substantive motion, she delayed to make it until the 12th May. The demandant in the meantime (as appears by the affidavits) took certain steps in the cause, issuing the *venire facias*, subpoenaing witnesses, &c.—The affidavits also shew that the writ was

altered before the return day, and before it was in any manner executed, and that it was resealed. The alteration therefore was a perfectly authorized and correct act. In *Adams v. Railway*, the writ had been executed before the alteration. So, in *Durdon v. Hammond*, 1 B. & C. 111, 2 D. & R. 211, the writ had been executed; and it was held that it might before it was returnable be altered as to the return day, without being restamped, provided the last appointed return day was not beyond the time at which the writ might at first have been made returnable. There is no authority to shew that, in the mere practice of the court, there exists any distinction between real and personal actions, though, in the former, a greater degree of strictness is required in pleading. The amendment here was not of a nature to render an application to the court or a judge necessary: and, where an amendment of process is matter of course, the court will not set it aside—*Popkins v. Amory*, 5 M. & P. 319, 7 Bing. 434, *nom. Popkins v. Smith*.

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Bompas, Serjeant, in support of his rule.—In *Adams v. Railway*, it was expressly decided that the court will not assist a demandant in a writ of right, and therefore will not allow him to quash a writ of summons which has been irregularly executed. Both parties are supposed to be in court when the writ of summons issues—*Tyssen v. Clark*, 3 Wils. 420, 5 Hl. And it is laid down in 2 Inst. 567, and in Booth. 96, and Roscoe, 147, 297, that there must be fifteen days between the teste and return of the writ. Here, the writ of summons issued on the 10th of April, and was made returnable on the 20th. An amendment of process for bringing a party into court is very different from the amendment of a judicial writ. When the writ has once come to the hands of the sheriff, he is bound to return it to the court. In Comyns's Digest, *Enquest*, (C. 1.), it is said: "If the venire is returnable subsequent to the as-

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sizes, the verdict shall be set aside; and it shall be entered upon the roll that the jury made default at the return of the venire facias. If several issues between the same parties arise within the same county, the court will grant but one venire facias, and several writs of venire facias cannot afterwards be granted, though nothing be done upon the first." Until the tenant came into court, she had no notice of the process by which the knights were summoned. [*Park, J.*—This objection was at all events known to the party on the 24th April. The rule was not moved for until the 12th May, and the other side have taken steps in the meantime.] The demandant knew the objection was intended to be urged; and therefore he should not have taken any steps.

TINDAL, C. J.—This is an application to the court to set aside the writ of summons and subsequent proceedings in this writ of right, for irregularity. The alleged irregularity is, that, after the issuing of the writ of summons, and before the return thereof, the demandant's attorney took upon himself to alter the return from the 20th to the 24th April. Had that been an accurate representation of the facts, the objection might have availed. But it appears from the affidavits that this is not a fair statement of what has been done on the present occasion. The writ was issued on the 10th April, and returnable originally on the 20th. To this there were two objections; in the first place, there were not fifteen days between the teste and the return, and, in the second place, the 20th was not a day in court. The officer therefore ought not to have issued the writ: and, if the practice were now, as formerly, for the officer to draw up the writ, the mistake would not have occurred. Suppose, the moment the officer had signed the writ, and before the attorney had left the office, discovering the mistake, he had returned and desired the officer to alter it, could any objection then have arisen?

Certainly not. It appears that, after the delivery of the writ to the sheriff, but before anything was done upon it (c), the mistake being discovered, the writ was taken back to the office, altered by the party, and re-sealed. It is the practice in the office to sign the writ once only, and merely to re-seal it upon any alteration. This writ therefore having been duly re-sealed and again placed in the hands of the sheriff, I cannot look upon it as any other than regular process. If any real injury had resulted to the tenant from the alteration, the case would have been different. But it appears that, on the 20th, the tenant had notice that the knights were summoned for the 24th. The writ itself is not directed to the tenant, but to the sheriff, like the *venire facias*. Without, therefore, looking to the other objection taken by the demandant to the tenant's right to maintain this rule (though I must confess that it seems to me that the tenant has been guilty of laches), I am of opinion that we ought not to interfere.

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PARK, J.—I am of the same opinion. If anything had been done on the writ, the case would have fallen within *Adams v. Radway*. There the court proceeded on the ground that the writ had been irregularly executed. Here, however, it had been merely placed in the hands of the sheriff, and the error was discovered and rectified before the knights were summoned. I agree that the proceedings in a writ of right ought to be watched with considerable jealousy; but still amendments are in the discretion of the court.—Even if it had not appeared that the other side had taken any steps in the cause, I for one should be inclined to think that a delay of eighteen days (from the 24th April, when the tenant was certainly aware of the supposed irregularity, to the 12th May) would be such a

(c) A plaintiff cannot alter his writ after *service*; and a notice not served, will not cure the defect. Glenn v. Wilks, 4 Dowl. P. C. 322. to appear to the copy of a writ first

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Dem.
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delay as to disentitle the tenant to come and complain of any irregularity. It is essential to the due and speedy administration of justice, that objections of this sort should be urged at the earliest practicable moment.

GASLER, J.—If the amendment had been in some solemn act of the court, it might have been a question whether the sanction of the court should not have been obtained for it. The record, however, is never made up at so early a stage of the proceedings. Under the circumstances, I think the alteration of the writ in question is no valid ground of objection: the error was in fact that of the officer of the court.

VAUGHAN, J.—It is true that the court does not usually lend its assistance to enable a demandant in a writ of right to get over any difficulty. In the present case, however, the objection is not founded either upon any rule of court or decided case, or upon reason, justice, or expediency. Originally all writs were actually filled up by the officer of the court, though now that duty is performed by the attorney: therefore the mistake may still be considered as the act of the officer. If the writ had been executed, the alteration would have been unwarranted: but, inasmuch as nothing had been done upon it beyond the delivery of it to the sheriff, the case assumes a very different aspect. Upon the whole it seems to me, with every desire to give the party no assistance that he is not strictly entitled to, that this rule ought to be discharged.

Rule discharged, without costs (*d*).

(*d*) See *Leigh v. Leigh* and *Foot v. Shirreff*, post, Hilary Term, 6 Will. 4.

Monday,
June 1st.

In order to
dispense with
the production

At the trial, as part of the tenant's case, the will of Thomas Miller (the father of the demandant and late

husband of the tenant), dated the 15th May, 1806, was produced. This will appeared to have been attested by Edward Keon, Robert Willis, and Duncan Campbell, described as clerks to Messrs. Vandercom & Comyn, the solicitors who prepared the will. With respect to Keon and Campbell, the evidence was that one of them, on leaving Vandercom & Comyn's, went away no one knew where, and that the other went to Ireland and had never since been discovered: and, with respect to Willis, it appeared that the tenant's attorney had, in November, 1834, and in May, 1835, without effect, applied to Mr. Comyn, by letter, for information generally, on the first occasion as to the will, and on the second as to where Willis might be found; that he had searched the rolls of attorneys of the several courts with no better success; that, on the 25th May last, he advertized for him in the Times, Morning Chronicle, and Morning Advertiser newspapers, and also in a Sunday paper, with the like result; and that inquiry had also been unavailingly made of a person named Reynolds who was also a clerk in Vandercomb & Comyn's office at the time of the execution of the will. Mr. Comyn, who was called, stated, on cross-examination, that, in the year 1816, when an ejectment was tried touching the property now in question, Willis was a clerk in the house of Swain & Co.; but that he had omitted, inadvertently and from want of recollection, to make known this fact to the tenant's attorney: he also stated that the other two witnesses could not be found at that time, notwithstanding diligent search.

Talfourd, Serjeant, for the demandant, submitted that sufficient diligence had not been shewn to have been used to entitle the tenant to produce the will on proof of the handwriting of the attesting witnesses; that the mere

property in 1815, a fact which he had forgotten to communicate at the time he was asked for information, but which (it was suggested) he could not have failed to remember had any strict inquiry been instituted.

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of an attesting witness to a will bearing date the 15th May, 1806, it was proved that applications had been made by letter to the attorney in whose office the witness was at the time a clerk, in the first place for general information respecting the will, and afterwards for information respecting the witnesses by whom it was attested, and that advertisements for their discovery had a week before the trial been inserted in three daily and one weekly newspaper, but without success:—Held, that sufficient had been done to entitle the party to have the will read on proof of the handwriting of the witnesses—although the attorney of whom the inquiries had been made, stated that one of the witnesses was examined in a cause touching the

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Dem.
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general applications by letter to Mr. Comyn, for information as to their places of present abode, in November and May last, and the advertizements inserted in the newspapers only a week ago, were not sufficient to dispense with the production of Willis; particularly as it appeared to have been within the knowledge of Mr. Comyn that he was a clerk at Swain & Co.'s in 1815 (where, for anything that appeared, he might still be), a fact that would most likely have been elicited by a personal communication with Mr. Comyn.

TINDAL, C. J.—The only question is whether or not sufficient inquiry has been made for the discovery of Willis, one of the attesting witnesses; for, as to the other two, they are sufficiently accounted for. The point, it is to be observed, arises upon a will executed twenty-nine years ago: in another year the will would prove itself. It appears that, in the year 1815, Willis was examined as a witness upon the trial of an ejectment respecting the property now in dispute; and that he was then a clerk in the house of Swain & Co.: but that the inquiries that have been on this occasion made by the tenant's attorney of Mr. Comyn, who was acquainted with this fact, did not elicit it from him, it having, as he says, escaped his recollection. Under the circumstances, it seems to me that enough has been done to warrant the court in receiving the will on proof of the handwriting of the parties.

PARK, J.—I am of the same opinion. It appears that it is now about twenty years since Willis was last seen by Mr. Comyn, and that the fact of his having in the year 1815 been in the employ of Swain & Co., was never communicated to the tenant's attorney. There is therefore no reason for imputing it as negligence to the party that no inquiry was made at Swain & Co.'s.

GASELEE, J., concurred.

VAUGHAN, J.—I also think there is no ground to charge the tenant's attorney with an omission to use reasonable diligence to discover the attesting witnesses to this will. He seems to have addressed his inquiries to the only channel where he was likely to obtain the information he desired.

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The will was accordingly admitted.

Talfourd, Serjeant, and *Busby*, for the demandant.

Bompas, Serjeant, and *W. H. Watson*, for the tenant.

Verdict for the tenant.

COX v. PEACOCK, Executor, &c.

WILSON, for the plaintiff, upon a plea of plene administravit præter, prayed judgment of assets in futuro.—In *De Tastet v. Andrade*, 1 Chit. Rep. 629, n., the court of King's Bench held, that, though an administrator in such a case is not personally liable to pay costs, yet that judgment might well be entered for them, to be recovered de bonis testatoris quando acciderint. Mr. Tidd, in the 9th edit. of the Practice, p. 980, cites a case of *Butt v. Deschamps*, where, after two arguments, and consulting with the judges of the court of King's Bench, whose practice had been to allow costs out of the future assets, and on looking into the precedents, this court held, that, when an executor or administrator pleads plene administravit, or judgments outstanding and plene administravit præter, and the plaintiff, admitting the truth of the plea, takes judgment of assets in futuro, the defendant is not

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May 29th.

On a plea of plene administravit præter, the plaintiff is entitled to judgment of assets in futuro for debt and costs.

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Cox
v.
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liable to costs. The precedents, however, will be found to contain an award of costs (a).

TINDAL, C. J., observed that it would be convenient that the like rule should prevail in all the courts, and therefore that the court would speak to the other judges on the subject: and, on a subsequent day, he intimated that they were of opinion that the plaintiff was entitled to judgment of assets quando acciderint both for debt and costs.

Rule accordingly.

(a) See Tidd's Appendix to the 9th edit. of the Practice, pp. 187 to 190, where the precedents will be found generally to contain no award of costs on a judgment of assets in futuro, either on a plea of plene administravit, or of plene administravit præter.

Friday,
May 29th.

In a memorial of an annuity inrolled pursuant to the 53 Geo. 3, c. 141, s. 2, one of the columns was headed thus—"Person for whose the annuity is granted:"—Held, sufficient.

FLIGHT v. Lord LAKE.

COVENANT on an annuity deed. The defendant, after setting out the deed on oyer, pleaded that no memorial of the indenture stating for whose life or lives the annuity was granted, had been inrolled pursuant to the statute 53 Geo. 3, c. 141, s. 2. The plaintiff replied that a memorial was duly inrolled. The cause was tried before Tindal, C. J., at the Sittings at Westminster after the last term. The clause of the statute above mentioned gives the form of the memorial as follows:—

Date of instrument.	Nature of instrument.	Names of Parties.	Names of Witnesses.	Name or names of Person or persons person or persons by for whose life or whose annuity or rent lives the annuity charge to be benef- or rent charge is cially received.	Consideration, and how paid.	Amount of annuity or rent charge.

It appeared that a memorial of the annuity in question had been inrolled in the form prescribed by the above statute; but that the heading of the sixth column was as follows: "Person for whose the annuity is granted." On the part of the defendant, it was objected that this defective memorial avoided the annuity. A verdict having been taken for the plaintiff, with liberty to the defendant to move to set it aside and enter a nonsuit on this ground—

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 FLIGHT
 v.
 Lord LAKE.

Maule now moved accordingly.—He submitted that the memorial was insufficient, the form given by the statute not being pursued strictly; and that, if the omission were to be supplied by intendment, there could be no more reason for interpolating "life" than any other word.

TINDAL, C. J.—The only question is, whether it is possible to misunderstand what was intended. The instrument is headed—"Memorial of an annuity granted, which is inrolled by virtue of an act passed in the 53rd year of the reign of his present Majesty," &c. It clearly appears, therefore, to have been intended to be a memorial according to the form prescribed by this act. The several columns are properly headed, with the exception of one, which is imperfect—"Person for whose the annuity is granted." Seeing that the statute relates only to annuities determinable on a life or lives, how can we reasonably intend that any other word than "life" was the word accidentally omitted. All the information which the statute requires is substantially given to the parties. Some allowance must be made for clerical infirmity in such a case.

The rest of the court concurring—

Rule refused.

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Friday,
May 29th.

A devisee in fee may by deed under his hand and seal disclaim an estate devised to him, without a formal disclaimer in a court of record.

BEGBIE v. CROOK.

THIS was an action of replevin. The defendant, as bailiff, made cognizance for six years' rent due to T. Veal and J. W. Baugh. Plea, non tenuit modo et formâ. At the trial before Tindal, C. J., at the Sittings at Westminster after last Hilary Term, it appeared that the premises in respect of which the rent accrued were devised by Colonel Solway, in trust, to T. Veal, J. W. Baugh, and one H. Lloyd; that, on the 21st June, 1827, Lloyd, who had never acted as trustee, by deed disclaimed all interest in the freehold and copyhold property devised to Veal, Baugh, and himself; and that, before the last quarter's rent accrued, Lloyd died. On the part of the plaintiff, it was contended that the deed of 1827 did not operate so as to divest Lloyd of the legal title vested in him by the devise, and consequently that (except as to the last quarter) cognizance should have been made in the names of the three trustees. A verdict was taken for the whole rent due, with leave to the plaintiff to move to reduce it to the amount of the last quarter.

Humfrey, in Easter Term, obtained a rule nisi accordingly.

Talfourd, Serjeant, and *Archbold*, shewed cause.—That there may be a disclaimer by *deed*, is clear: the only doubt suggested in any of the cases is, whether it may be by *parol*. In *Townson v. Tickell*, 3 B. & Ald. 31, it was held that a devisee in fee may by deed under his hand and seal disclaim an estate devised to him, without a formal disclaimer in a court of record. [*Gaselee*, J., referred to *Doe d. Smyth v. Smyth*, 9 D. & R. 136, 6 B. & C. 112, where a devisee of lands refused to take them under the will, but claimed to be entitled to them as heir at law, and

it was held that this was no disclaimer, and that he might afterwards recover possession of the lands as devisee.] In *Nicholson v. Wordsworth*, 2 Swanst. 365 (where all the cases on disclaimer are collected), the purchaser of an estate filed a bill against the defendants to compel them to execute a conveyance. It appeared by the answer that the defendants had been made executors under the will of one Richard Wordsworth, but that Hutton (one of the defendants) had renounced probate, and refused to act; and had by indenture bargained, sold, *released*, quitted claim, and conveyed to the other executor, his heirs and assigns, his estate in the property. It was contended on the one hand that the release was equivalent to an acceptance of the devised estate; and, on the other, that the release, being made with an intent to disclaim, was equivalent to a disclaimer. Lord Eldon said: "It seems to have been taken for law from an older period than the date of *Crewe v. Dicken*, 4 Ves. 97, and sanctioned by Lord Hale, that, if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other. If, therefore, the party executes a simple instrument, and under his hand and seal declares that he *disclaims*—that is, dissents from being a trustee—the fact must be taken to be that he is no trustee. But, in *Crewe v. Dicken*, the difficulty occurred, that, instead of doing this, the party conveyed his estate to the other trustee." And, after alluding to Lord Loughborough's opinion upon the effect of the release, his lordship added: "If the essence of the act is disclaimer, and if this point were *res integra*, I should be inclined to think, that, if the mere fact of disclaimer is to remove all difficulties, and vest the estate in the other trustee, a party who releases, and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee:" and he ultimately decided, that, where one trustee releases with the intention to disclaim, the property vests in the

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BRADIN
v.
CROOK.

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&
CROOK.

other, the assenting trustee. And this decision of Lord Eldon is assented to by Bayley, J., in the case of *Small v. Marwood*, 9 B. & C. 308, 4 M. & R. 181.

The court called upon *Humfrey* to distinguish the case from *Townson v. Tickell*.—He admitted that no case was to be found impugning the authority of *Townson v. Tickell*, and that it was not distinguishable from the present.

TINDAL, C. J.—We must decide this case upon the authority of *Townson v. Tickell*, which seems to me to be conformable with reason and good sense.

PARK, J.—I am of the same opinion. *Townson v. Tickell* is confirmed by Lord Eldon in *Nicholson v. Wordsworth*, and is not impugned by *Doe d. Smyth v. Smyth*.

The rest of the court concurring—

Rule discharged (a).

(a) It did not appear whether the land in respect of which the rent was claimed was freehold or copyhold. If copyhold, then, as the devisees would until admittance be merely *cetteux* que usent of the surrender to the use of the will, even a *parol* disclaimer would have been sufficient—3 Rep. 27. But, if the land was freehold, the efficiency of the disclaimer by *deed* would depend upon the validity of *Townson v. Tickell*, which was decided contrary to Butler & Ba-

ker's case, 3 Rep. 25, upon the supposed authority of *Thompson v. Leach*, 2 Vent. 196, the judgment in which case (the same as that in *Townson v. Tickell*) was reversed in the House of Lords, and of *Bonifant v. Greenfield*, Cro. El. 81, 1 Leon. 60, which turned upon the wording of a particular act of parliament, and was otherwise wholly inapplicable to the question of divesting estates once vested. Vide 4 Man. & R. 189, n., and 5 Man. & R. 148, n.

1835.

*Saturday,
May 30th.*

In the Matter of THOMAS LORD.

GODSON, in Easter Term, obtained a rule nisi to refer to the Prothonotary certain accounts delivered to the applicant by his late attorneys, upon a suggestion of fraud.

W. H. Watson, contra, submitted that, as the affidavits upon which the rule had been obtained did not make it appear either that the parties against whom the application was made were attorneys of this court, or that the accounts in question, or any part of them, arose out of any cause in this court (a), the court could exercise no jurisdiction in the matter.

Godson, in support of his rule, contended, that, inasmuch as the names of all attorneys of the court are entered on the roll, the court would take judicial notice of the fact of a party whose name appeared upon that roll being an attorney of the court. To shew that part of the charges were for business done in this court, he referred to one of the accounts which exhibited a charge for a summons before *Gaselee*, J., in an action of ejectment; but it did not expressly appear that the ejectment was pending here.

PER CURIAM.—The court will undoubtedly keep a strict watch over the conduct of its officers: but, unless a case of gross fraud be made out, and it is made to appear that

The court will not entertain a motion touching the conduct of an attorney, unless it appears upon affidavits that he is an attorney of the court, or that the transaction arises, in part at least, out of a cause before the court: nor will the court exercise its summary jurisdiction over an officer, unless in a case of palpable fraud.

(a) In the matter of *Marris*, 2 Ad. & El. 582, the court of King's Bench refused to call upon an attorney to repay money, or to account before the master, on the grounds merely that the attorney obtained such money from his cli-

ent as if for the purposes of a suit, but that his bill was said not to account satisfactorily for the obtaining and application of such money, that the amount seemed immoderate, and that the client stated a case of fraud.

1835.

In re LORD.

some precise and beneficial object is attainable by a motion like the present, it will not be entertained. In this case we think we have no jurisdiction: the affidavits do not shew that the parties against whom the application is directed, are attornies of this court; nor does it appear that the accounts relate to any cause before this court.

Rule discharged, with costs (*b*).

(*b*) The court will not order an attorney to pay over a sum of money received by him in his character of attorney, except upon the application of the *client* to whom the money is due. No rule will be granted at the instance of a third party. In re Fenton, 5 N. & M. 239.

Saturday,
May 30th.

The verdict of the jury is not conclusive as to the amount for which the plaintiff had reasonable cause (within the meaning of the 43 Geo. 3, c. 46, s. 3) for holding the defendant to bail. *Quere.*

MANTELL v. SOUTHALL.

ASSUMPSIT for goods sold and delivered. Plea—non assumpsit. The plaintiff was an ale and porter brewer, the defendant a retailer of beer. The defendant was arrested for 20*l.* 2*s.* A sum of 8*l.* had been paid into court; and the jury found a verdict for the plaintiff for 2*l.* 17*s.*—disallowing 9*l.*, the price of three hogsheads of porter which they found to have been of bad quality (upon which point there was evidence on both sides), and 5*s.* part of a sum of 11*s.* charged for a cask of finings, the defendant proving at the trial that 6*s.* was the fair and ordinary charge for that article.

F. Kelly, in the last term, on the part of the defendant, obtained a rule nisi for costs under the 43 Geo. 3, c. 46, s. 3, upon affidavits alleging circumstances calculated to induce a suspicion that the charges had been improperly enhanced for the purpose of raising the debt to an amount for which the defendant might be holden to bail.

Bompas, Serjeant, shewed cause.—He submitted that it was not competent to the defendant, under the plea of non assumpsit, to give evidence as to the bad quality of the porter: and, as to the finings, he produced affidavits stating that 11s. was a fair and ordinary charge for finings of the description furnished to the defendant, the article used for ale (as this was) being of a quality superior to that used for porter; and that, had he been aware of the objection, he might have been prepared with witnesses to prove this. [*Gaselee*, J., before whom the cause was tried, observed that he had anticipated a verdict for the plaintiff for 11l. 17s.]

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F. Kelly, in support of his rule, submitted that the finding of the jury was conclusive as to the reasonableness or unreasonableness of the charges; and that the affidavits sufficiently disclosed an absence of reasonable or probable cause for the arrest, to bring the case within the statute.

TINDAL, C. J.—This is certainly a case of suspicion: but we must not act upon suspicion. The words of the act are—"provided it shall be *made appear* to the satisfaction of the court in which such action is brought, that the plaintiff had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount." This carries it to a higher point than mere suspicion: it must appear affirmatively to the court that there was no reasonable or probable cause for the arrest. The arrest was for 20l. 2s.: 8l. were paid into court, and the verdict was for 2l. 17s.; leaving a deficiency of 9l. 5s. Now, as to the porter, the only question is whether the plaintiff might not fairly and honestly have thought that he was entitled to recover for that; there was evidence either way touching the quality of the article, and the learned judge tells us that he anticipated a

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verdict for the plaintiff for that part of the demand (a). Under these circumstances, I think the defendant has failed to make it appear, so far as concerns the porter, that there was an absence of reasonable or probable cause for the arrest. Then, as to the findings, the plaintiff had no notice that the defendant intended to dispute the price, and therefore came to the trial unprovided with evidence to support the charge, which he now swears he could have done, giving us a probable ground for thinking his statement to be correct. Upon the whole, therefore, I think we should be dealing rather in speculation than in certainty, or even probability, were we to hold the case to fall within the meaning of the statute.

The rest of the court concurring —

Rule discharged (b).

(a) In *Tipton v. Gardiner*, 5 N. & M. 424, it was held that an application for costs under this statute, on the ground that the plaintiff was arrested for 35*l.*, and recovered only 19*l.* 19*s.*, is not answered by affidavits stating that the plaintiff's demand was reduced at the trial by the false evidence of a witness who was in fact a partner of the defendant, but stated herself to be his servant only. Lord Denman, C.J., there said: "It might have been made the ground of a motion for a new trial, that the evidence of Mrs. Inch was fraudulently palmed upon the jury as the evidence of an independent witness; but there seems to me to be nothing to take the case out of the general rule that the

amount of the verdict is prima facie proof of the want of reasonable and probable cause to arrest for the amount sworn to." And per Patterson, J. — "We cannot try the case over again upon affidavits." And see *Twiss v. Osborne*, 4 D. P. C. 107, where Coleridge, J., says: "The court is not at liberty to go into the question whether the jury had or had not come to a right conclusion in point of fact. It must now take the facts to be as the jury have found them. If they have come to an erroneous conclusion, the plaintiff should have taken steps to correct their finding."

(b) And see *Von Nieuwvel v. Hunter*, 5 N. & M. 376.

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FRUHLING and Another v. SCHRODER and Another.

ASSUMPSIT for money had and received. Plea, non *assumpsit*. At the trial before Tindal, C. J., at the Sittings in London after the last Hilary Term, the facts that appeared in evidence were as follow:—The plaintiffs were merchants in London, the defendants, Schroder, Maha, & Co., of Hamburg: both of them were in the habit of corresponding with and receiving consignments from Messrs. Joppert & Co., of Rio de Janeiro. The action was brought to recover the net proceeds of two parcels of coffee (80 bags and 30 bags) that had been consigned by Joppert & Co. to the defendant's house at Hamburg. The bills of lading of the coffees were transmitted by Joppert & Co. to Schroder, Maha, & Co. in two letters to the following effect, dated respectively the 28th June and 9th July, 1832:—

"Inclosed we hand you bill of lading and invoice of 80 bags coffee shipped to your address per Constance [30 bags per Fortune]. We request you will promptly realize in the best possible manner this small parcel *for our account*, and *remit the proceeds*, as also the residue of our one third share of the sugars per Galathea, to Messrs. Fruhling & Goschen, London."

These letters reached Hamburg on the 17th and 18th September, and on the 12th October, Messrs. Schroder, Maha, & Co. wrote to Joppert & Co. as follows:—

"We have done the needful with the bills of lading and invoices of the 80 bags per Constance and the 30 bags per Fortune *for your account* to our address, and on arrival of the vessel (which, as Mr. Otto will have informed you, took place some weeks ago) have stored the property. We immediately endeavoured all we could to effect sales, but, on account of declining markets, have hitherto not been able."

J. & Co. of Rio consigned coffee to the defendants, with directions to remit the proceeds to the plaintiffs, and advised the latter of their having done so. The plaintiffs thereupon wrote to the defendants, requesting to be informed of the probable amount of the remittance. The defendants in answer merely stated that they had received the coffee with directions to remit the plaintiffs the proceeds, but that they had not yet disposed of it. J. & Co. having failed, the defendants retained the greater part of the proceeds of the coffee in satisfaction of a balance due to themselves from J. & Co.:—Held, that the plaintiffs were entitled to recover the whole in an action for money had and received.

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Messrs. Joppert & Co. having, in a letter bearing date at Rio the 29th August, 1832, advised the plaintiffs of their having drawn upon them two bills of 250*l.* 9*s.* 9*d.* and 184*l.* 8*s.* 4*d.* adding—"We request you to charge our account with these amounts, and, as Messrs. Schroder, Mahs, & Co., at Hamburg, will have to make you further remittances for our account against our consignments to them, we believe that our account with you will be at least balanced"—the plaintiffs on the 6th November wrote to Schroder, Mahs, & Co. as follows:—

"Our mutual friends Messrs. Joppert & Co., of Rio, write us that we may expect from you some remittances for their account: accordingly, we request you will have the goodness to inform us the probable amount."

To this letter, Schroder, Mahs, & Co., on the 16th November, sent the following answer, which was received by the plaintiffs on the 22nd:—

"In answer to your esteemed favour of 6th instant, we beg to state that Messrs. Joppert & Co., Rio de Janeiro, have directed us to remit you the proceeds of their consignment to us of 110 bags fair ordinary coffee, which however are not yet disposed of."

On the 24th September, 1833, the defendants wrote a letter to the plaintiffs, stating that by order and on account of Joppert & Co. they inclosed a bill for 36*l.* 4*s.* 1*d.*, payable at three days' sight—retaining the rest of the proceeds in satisfaction of their own balance.

It was proved by a clerk in the plaintiffs' house, that, when the bills for 250*l.* 9*s.* 9*d.* and 184*l.* 8*s.* 4*d.* were first presented to the plaintiffs for acceptance, they had declined to accept them, but did so on the receipt of the letter from Schroder, Mahs, & Co., of the 16th November; and that these bills were duly paid.

It further appeared that an account current had been transmitted by Schroder, Mahs, & Co., to Joppert & Co., at the close of the year 1832, on which the latter, after credit

given for the proceeds of the coffee in question, stood indebted to the former to the amount of about 750*l*. Joppert & Co. suspended their payments at the close of 1832.

On the part of the plaintiffs it was contended that the acceptance by the defendants of the consignment to them, and the letters which passed between the parties, amounted to a distinct contract between them that the proceeds of the coffee should be the property of the plaintiffs. On the other hand, it was insisted that there was no contract or undertaking on the part of the defendants to do anything; and that, if there was, it could only amount to an undertaking to remit the proceeds of the coffee to the plaintiffs, and form the subject of a special action on the case: and in support of this position *Williams v. Everett*, 14 East, 582, and *Yates v. Bell*, 3 B. & Ald. 643, were cited. His lordship left it to the jury to say whether or not the letters of the 6th and 16th November were such as to justify the conclusion that the defendants assented to hold the proceeds of the coffee in question for the use of the plaintiffs, in obedience to the directions of the consignors, Joppert & Co. The jury returned a verdict for the plaintiffs for 352*l*., being the amount of the proceeds with interest thereon from the time of the sale.

Taddy, Serjeant, in Easter Term, moved for a rule nisi for a new trial, on the ground of misdirection; and also (in pursuance of leave) to reduce the damages by the amount given for interest, on the ground that interest was not recoverable on such a demand either before or since the statute 3 & 4 Will. 4, c. 42, s. 28.—1. The letters import no undertaking on the part of the defendants to apply the proceeds of the coffee to the use of the plaintiffs: the defendants' letter of the 16th November amounts to no more than the communication of the fact of Joppert & Co. having directed them to remit the proceeds to the plaintiffs. There was no consideration moving from the plaintiffs to

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the defendants whence any promise or undertaking can be implied. In *Williams v. Everett*, 14 East, 590, one Kelly, residing abroad, having remitted bills on England to the defendants, his bankers in London, with directions in the letter inclosing such bills, to pay the amount in certain specified proportions to the plaintiff and other creditors of Kelly, who would produce their letters of advice from him on the subject; and desiring the amount paid to each person to be put on the back of their respective bills; and that every bill paid off should be cancelled; and the plaintiff having before the bills became due given notice to the defendants that he had received a letter from Kelly, ordering payment of his debt out of that remittance, and having offered them an indemnity if they would hand over one of the bills to him; but the defendants having refused to indorse the bills away, or to act upon the letter; admitting, however, that they had received the directions to apply the money; and the defendants having in fact afterwards received the money on the bills when due:—it was held that they did not by the mere act of receiving the bills, and afterwards the produce of them, with such directions, and without any assent on their part to the purport of the letter, and still more against their express dissent, bind themselves to the plaintiff so to apply the money in discharge of his debt due to him from Kelly; and consequently that the plaintiff (between whom and the defendants there was no privity of contract express or implied, but on the contrary it was repudiated) could not maintain an action against the defendants as for money had and received by them to his use; but that the property in the bills and their produce still continued in the remitter. Lord Ellenborough there says: “ If it be money had and received for the use of the plaintiff under the orders which accompanied the remittance, it occurs as fit to be asked, *when* did it become so? It could not be so before the money was received on the bill becoming due:

and at that instant, suppose the defendants had been robbed of the cash or notes in which the bill in question had been paid, or they had been burnt or lost by accident, who would have borne the loss thus occasioned? Surely the remitter Kelly, and not the plaintiff and his other creditors, in whose favour he had directed the application of the money according to their several proportions to be made. This appears to us to decide the question; for, in all cases of specific property lost in the hands of an agent, where the agent is not himself responsible for the cause of the loss, the liability to bear the loss is the test and consequence of being the proprietor, as the principal of such agent." And in *Yates v. Bell*, 3 B. & Ald. 643, where a bill of exchange, payable at the house of A. had been there presented for payment, and dishonored, and the acceptor afterwards remitted to A. a sum of money for the purpose of enabling him to pay the dishonored bill, and also another of less value, and A. in answer stated the fact of the bill having been dishonored, but added, that the money received should be carried to the acceptor's account, and did afterwards pay the smaller bill: it was held that the holder of the original bill could not maintain an action against A., there being no privity between them. Here, his lordship should have directed the jury as to the legal effect of the correspondence.

2. Money had and received, at all events, was not the proper form of action. The plaintiffs should have brought a special action upon the case, in which they would, if entitled to recover at all, recover the exact amount of damage they might have sustained; whereas, by the present form of action, they can only recover the amount of the proceeds, whether the actual damage they had sustained by the supposed breach of contract on the part of the defendants be greater or less.

3. The statute 3 & 4 Will. 4, c. 42, s. 28, enacts "that; upon all debts or sums certain payable at a certain time,

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or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable *by virtue of some written instrument at a certain time*; or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: provided that interest shall be payable in all cases in which it is now payable in law." Here, the demand, though payable, if payable at all, by virtue of a written instrument, is not payable at a certain time; and there has been no demand of interest: consequently interest is not now recoverable.

TINDAL, C. J.—It appears to me that the point that was submitted to the jury in this case was the proper one, viz. whether the correspondence that was proved to have taken place between the several parties, coupled with the other evidence in the cause, did not amount to an assent on the part of the defendants to appropriate to the use of the plaintiffs the proceeds of the coffee in question; and that, after they had so signified their assent to such appropriation, they could not recede: and money had and received seems to me to be the proper form of action. The question is, whether or not there has been any such complete assent. It appeared in evidence that Joppert & Co., merchants residing at Rio, wrote to the defendants' house in Hamburg on the 28th June and 9th July, 1832, advising them of the shipment to their address of 80 bags and 30 bags of coffee, with directions to remit the proceeds to the plaintiffs. Had the matter rested there, it was undoubtedly optional with Schroder & Co. to comply with this direction or not. If they had declined to accede to it,

the plaintiffs would have had no right of action against them: the case would then have fallen within that of *Williams v. Everett*. The next step in the evidence, however, was, a letter addressed by Joppert & Co., on the 29th August, to the plaintiffs, communicating to them the order they had given to Schroder & Co. Both parties, therefore, were then made acquainted with the terms on which the consignment of the coffee had been made by Joppert & Co. To remove any doubt, the plaintiffs, on the 6th November, write to Schroder & Co., requesting to be informed as to the probable amount of the expected remittance. It was at this time still open to the defendants to make known to the plaintiffs their intention to retain the amount: and if they had done so the plaintiffs would have been put upon their guard against Joppert & Co. Instead of that, however, the defendants write to them on the 16th to the following effect:—"Messrs. Joppert & Co., of Rio, have directed us to remit you the proceeds of their consignment to us of 110 bags of fair ordinary coffee, which however are not yet sold." It has been said that it was the province of the judge to give the legal construction to this correspondence. If that be so, I have no hesitation in saying that the writer of the letter of the 16th November, meant it to be understood that he had assented to receive the consignment in question upon the terms proposed by the consignors. But the usual course of late, in causes relating to mercantile transactions, has been, for the judge not to take upon himself to determine what is the effect of the contract, particularly where (as was the case on the present occasion) there is other evidence mixed up with it. In *Williams v. Everett*, the defendants expressly renounced the terms proposed; therefore well did Lord Ellenborough say, "there is no assent on the part of the defendants to hold this money for the purposes mentioned in the letter." Looking at the whole of this case, it appears to me that the three parties were

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brought together by the letters of the 28th June and 9th July and of the 29th August and 6th and 16th November: the consignors by the former directed the appropriation of the proceeds of the coffee, and the consignees and the plaintiffs assented to such appropriation. Without, therefore, going into any of the other parts of the case, I am of opinion that there was evidence to be laid before the jury, and that they have justly come to the conclusion that the defendants assented to hold the money arising from the sale for the use of the plaintiffs.—With respect to the interest, however, I think that a proper question for the consideration of the court; and therefore upon that point the defendants may have a rule nisi.

PARK, J.—I am of the same opinion. Had the defendants intended to apply the proceeds of the coffee in question in reduction of any balance that might be due to their house from the house of Joppert & Co., the proper course would have been to apprise the plaintiffs of such their intention the moment they received their letter of the 6th November. I also think money had and received was the proper form of action.

GASELEE, J.—I also am of opinion that the letter of the 16th November is conclusive as to the assent of the defendants to the terms upon which the consignment was made to them.

BOSANQUET, J.—I agree with the rest of the court that the rule should be granted only to reduce the damages by the amount of the interest. That the effect of the correspondence was left to the jury, is no ground of complaint: of late years, this has been the constant course in such cases. If the debtor and creditor and a third person meet, and it is agreed between them that the debt shall be transferred to the latter, a new contract is thereby

created upon which he can sue. That is precisely the present case. The result of the correspondence between Joppert & Co., Schroder & Co., and the plaintiffs, amounted to a direction on the part of Joppert & Co., and an assent on the part of Schroder & Co., that the proceeds of the coffee should be appropriated to the plaintiffs. From the moment of the sale, therefore, the net proceeds were held by the defendants on account of the plaintiffs; and consequently the present action is not misconceived.

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A rule nisi to reduce the damages by the sum allowed by way of interest on the net proceeds having accordingly been granted—

W. H. Watson now shewed cause.—It appeared to have been the course of dealing as between Joppert & Co. and the defendants to allow interest in account: consequently, when the defendants assented to transfer the amount of the proceeds of the coffee in question to the use of the plaintiffs, it passed subject to all the incidents that would have accompanied it had it been placed to the credit of Joppert & Co. with the defendants. It may be conceded that the statute referred to does not apply: but the jury were at liberty to assume that such was the contract. In *Arnott v. Redfern*, 11 Moore, 209, 3 Bing. 352, it was held, that, in whatever form a debt accrues, whether on a contract bearing interest, or otherwise, if it has been wrongfully withheld from the plaintiff, he using means to obtain it, the jury may give interest upon it, in the shape of damages for the unjust detention. Best, C. J., there says: "By our law interest forms no part of the original debt; it is created only by the express terms of a contract, by an engagement implied from the nature of the security, or by the usage of the trade to which such contract relates."

Independently of the 3 & 4 Will. 4, c. 42, s. 28, interest is not recoverable in an action for money had and received.

Therefore, where A. consigned goods to B., with directions to remit the proceeds to C., to which B. assented:—Held in an action, for money had and received by C. against B., that interest was not recoverable (there having been no notice that interest would be claimed), although by the course of dealing between A. and B. interest would have been payable as between them.

Taddy, Serjeant, in support of his rule.—In *Walker v. Constable*, 1 B. & P. 306, it was expressly held, that, in

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an action for money had and received, the plaintiff could recover only the net sum received, without interest. *Tappenden v. Randall*, 2 B. & P. 467, *Gordon v. Swan*, 12 East, 419, *De Havilland v. Bowerbank*, 1 Camp. 50, and *De Bernales v. Fuller*, 2 Camp. 426, are authorities to the same effect. Even if any course of dealing had been proved in this case to entitle Joppert & Co. to interest as between themselves and the defendants, that would not entitle the plaintiffs to claim it.

TINDAL, C. J.—It appears to me that the claim for interest in this case cannot be supported. The general rule has been laid down in so many cases, that interest is payable only where given by the express terms of a contract, by an engagement implied from the nature of the security, or by the usage of the trade to which the contract has relation, that it is unnecessary now to enlarge upon the subject. The law is expressly so laid down in *Walker v. Constable*, where it was held that interest is not recoverable in an action for money had and received; and the like was held in *De Bernales v. Fuller*. Therefore, unless that general rule be affected by the particular circumstances of this case, the plaintiffs cannot be held entitled to interest on this occasion. It has been urged, that, as between Joppert & Co. and the defendants, the money would carry interest, and therefore it must be held to pass to the plaintiffs accompanied with all Joppert & Co.'s rights. But there has been no course of dealing between the plaintiffs and defendants whence we can imply an engagement that interest should become payable.

PARK, J.—Had there been any understanding or course of dealing as to interest between these parties, the case would have stood clear of the authorities cited on the part of the defendants. But I think the circumstances of this case bring it precisely within those of *Walker v. Constable*

and *De Bernales v. Fuller*: and these cases are not contradicted by *Arnott v. Redfern*. *De Bernales v. Fuller*, which is also reported in 14 East, 590, n., is precisely in point. These authorities clearly establish that the plaintiffs are not entitled to interest in this case. In *De Bernales v. Fuller*, Mr. Justice Le Blanc, and in *De Haviland v. Bowerbank*, 1 Camp. 50, Lord Ellenborough, mention with disapprobation the circumstance of Mr. Justice Buller having in one instance allowed interest on policies of insurance.

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GASELER, J.—This was a single transaction between the plaintiffs and defendants; and, in the interpretation of the contract they have mutually entered into, we cannot import any usage or course of dealing as between the plaintiffs and other parties.

VAUGHAN, J.—It is admitted that this case is not within the late statute: neither is it within the general rule laid down in all the cases as to the allowance of interest. The question was very much discussed in *Higgins v. Sargent*, 2 B. & C. 348, 3 D. & R. 613, where the rule is thus stated by Abbott, C. J.: "The general practice of late years has been to allow interest only upon mercantile securities, such as promissory notes and bills of exchange, which carry interest by the custom of merchants, or in those instances where interest is secured by the express undertaking of the parties, or where such undertaking is implied from the usage of trade, or other circumstances." (a) There is nothing in the circumstances of the present case to take it out of that rule: there has been no express

(a) And see *Depcke v. Munn*, 3 C. & P. 112, where it is said (per Lord Tenterden, C. J.,) that the courts had so often decided that interest is not recoverable in an ac-

tion for money had and received, that the judge at Nisi Prius ought not to allow the question to be agitated.

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contract for interest; nor is an engagement to pay interest to be implied from the nature of the debt; and this was a mere insulated dealing between the parties.

Rule absolute.

SLATER and Another v. LE FEUVRE,
 and

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Le C., a trader in Guernsey, purchased goods of the plaintiffs, directing them to be forwarded to him at Guernsey. The goods were accordingly sent by waggon to Southampton—addressed, “J. Le C., Guernsey, care of W. S. Le F. (the defendant), Southampton.” The goods arrived at Southampton on the 10th May, and were taken from the waggon office by the defendant, who was the general shipping agent of Le C. at that port, and who paid the carriage, and shipped them for Guernsey on the 14th. On the 15th, a letter from Le C. to the defendant (written at the plaintiffs’ request) was received by the clerk of the defendant at Southampton, requesting the defendant to delay the shipment of the goods; and on the same day one of the plaintiffs arrived there for the purpose of stopping the goods—the vendee being insolvent and in prison. Arrived at Southampton, the plaintiff went with the defendant’s clerk on board the vessel in which the goods were, and caused them to be re-landed and conveyed to the defendant’s warehouse; the defendant’s clerk giving the plaintiff a letter wherein he engaged on the defendant’s behalf to hold the goods subject to the order of the owners:—Held, that the transitus of the goods was not ended on their arrival at Southampton and being taken possession of by the defendant, so as to entitle him to treat them as the property of the vendee, and hold them in assertion of a right of lien for the general balance due to him for business done for the vendee.

THESE were actions of trover, tried before Tindal, C. J., at the adjourned Sittings in London after last Hilary Term, when the following facts appeared in evidence:—The plaintiffs carried on business in London. The defendant was a shipping agent in Southampton. On the 7th May, 1834, one Le Couteur, of Guernsey, purchased of the plaintiffs several parcels of goods, which he directed them to forward to Guernsey, addressed “James Le Couteur, Guernsey, care of W. S. Le Feuvre, Southampton. Per waggon.” Le Feuvre (the defendant) was the general agent of Le Couteur at Southampton, acting in pursuance of instructions given to him by Le Couteur, by a letter dated the 14th August, 1830, whereby the latter directed him “to take charge of and forward all goods that might arrive at Southampton for him (Le Couteur), whether addressed to the care of him (Le Feuvre) or to

that of any other agent." Shortly after the arrival of the goods at the waggón office at Southampton, viz. on the 13th May, the defendant took them away, paying the charges, and shipped them in his own name. After the goods had been sent off, Coates, one of the plaintiffs, finding that Le Couteur had made large purchases from other houses in London, that he was in a state of insolvency, and in gaol (his continuing wherein was subsequently made the ground of a fiat in bankruptcy against him), went down to Southampton, where he arrived on the 15th May; and, learning that the goods had already been shipped, went with one Boutillier, the defendant's clerk (the defendant himself being absent from Southampton), on board the vessel, and desired that the goods might be re-landed. Boutillier, who it appeared was duly empowered to transact business for the defendant at the custom-house at Southampton, wrote and sent to the collector of customs a request to the following effect:—

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" I request to be allowed to re-land twelve packages of goods shipped by me on the 13th instant, on board the *Eliza*, having received directions from the owner to stop the shipment for the present."

Boutillier then gave Coates a letter addressed to his employer, the defendant, to the following effect:—

" Mr. Coates, of the firm of Slater & Coates, Wood Street, London, arrived here this morning per coach to stop the goods you shipped yesterday. I have caused them to be re-landed to await their instructions."

Boutillier, who was called as a witness, stated, that, on the morning of the 15th May, about an hour before Coates's arrival, he had received a letter addressed by Le Couteur to the defendant, desiring him not to ship the goods sent down to Southampton until further notice; and he also stated that it was in consequence of this letter, and not of the request of Coates, that he had procured the

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goods to be re-landed. This letter was written by Le Couteur by the desire of the plaintiffs' solicitor. On the 2nd August the plaintiffs formally demanded the goods. The defendant refused to give them up, claiming a right to retain them for the general balance due to him from Le Couteur for agency business.

The facts in both cases were substantially the same, with this exception only, viz. that, in *Nicholls v. Le Feuvre*, the stoppage of the goods was effected by Coates without any authority from the plaintiff.

On the part of the defendant it was submitted that the transitus of the goods was at an end on their being taken possession of by the defendant at the waggon office, and consequently that the stoppage was too late. *Dixon v. Baldwin*, 5 East, 175, *Noble v. Adams*, 7 Taunt. 59, *Foster v. Frampton*, 9 D. & R. 108, 6 B. & C. 107, 2 C. & P. 469, and *Allan v. Gripper*, 2 C. & J. 218, were cited. It was further contended (in *Nicholls v. Le Feuvre*), that the plaintiff could not take advantage of the stoppage by Coates, which was a perfectly gratuitous and unauthorized act. For the plaintiffs it was contended that the letter of the defendant's clerk was evidence of an undertaking to hold the goods subject to their order; that the transitus would end only on the arrival of the goods at their place of ulterior destination, Guernsey; and that Nicholls might by a subsequent ratification adopt the act of Coates. His lordship left it to the jury to say whether the goods were actually stopped by Coates whilst they were in progress to their place of destination, or whether they were stopped by Boutillier under the authority of Le Couteur: telling them that, if they thought the former, they must find for the plaintiffs; if the latter, for the defendant. The jury found that the goods were stopped in transitu, and that they were received by the defendant to be held subject to the order of the plaintiffs; and they accordingly returned a verdict for the plaintiffs in both causes—in *Slater v. Le*

Feuvre, damages 64*l.* 15*s.*, and in *Nicholls v. Le Feuvre*, damages 254*l.*, leave being reserved to the defendant to move to enter nonsuits.

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Sir *W. Follett*, in *Nicholls v. Le Feuvre*, (and *Bingham*, in *Slater v. Le Feuvre*), in Easter Term, obtained a rule nisi to enter a nonsuit, on the grounds urged at the trial.—

1. The general rule is, that, where goods are in a mere state of passage, the vendor has a right to stop them: but, if in the course of their passage they arrive at any place where the vendee, either by himself or an agent duly authorized, has or exercises control over them, the transit is at an end. In some of the earlier cases, particularly in *Hunter v. Beale*, 3 T. R. 466, n., Lord Mansfield seemed to think that the goods must come to the actual *corporal touch* of the vendee: but, in *Dixon v. Baldoen*, 5 East, 194, Lord Ellenborough repudiates that extent of the doctrine. “The question,” he says, “is, whether the party to whose touch it actually comes be an agent so far representing the principal as to make the delivery to *him* a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person acting virtually as a carrier or mean of conveyance to or on account of the principal in a mere course of transit towards him. In *Hunter v. Beale*, I cannot but consider the transit as having been once completely at an end in the first course of the goods to the innkeeper, and that they were afterwards *under the immediate orders of the vendee*.” In *Rowe v. Pickford*, 1 Mo. 526, 6 Taunt. 83, a trader in London was in the habit of purchasing goods at Manchester, and exporting them to the continent shortly after their arrival in London. The goods consigned to him remained in the waggon office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. It was held that, the trader having become bankrupt, his assignees were entitled to recover goods de-

1. As to whether or not the transitus was ended at the time of the stoppage.

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posited with the defendants before the bankruptcy; that the consignor had no right to stop them in transitu; and that, as the trader had no warehouse of his own, the transitus of the goods was at an end on their arrival at the waggon office. So, in *Foster v. Frampton*, 6 B. & C. 107, 9 D. & R. 108, where the vendee of several hogsheads of sugar, upon receiving from a carrier notice of their arrival, took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse *until he should receive further directions*, and, before they were removed, became bankrupt—it was held that the transitus was at an end, and that the vendor was not entitled to stop them. “Where,” says Bayley, J., “a man orders goods to be delivered at a particular place, the transitus continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business; for, if the consignee, before the goods reach their ultimate destination, postpone the delivery, or do any act which is equivalent to taking actual possession of them, the transitus is at an end.”

2. As to the authority of the party by whom the stoppage was effected.

2. Coates had no authority from Nicholls to stop his goods. It is said that there may be, and in this case has been, a subsequent recognition and ratification by Nicholls of the act of Coates. But, where the rights of third parties intervene, the authority of an agent must be existing at the time of the act done—*Right d. Fisher v. Cuthell*, 5 East, 491, *Doe d. Mann v. Walters*, 10 B. & C. 626, 5 M. & R. 357.

First point.

Bompas, Serjeant, shewed cause.—1. The goods in question had not reached their place of destination when they arrived at Southampton; the transit was from London to Guernsey. It is not true that the transitus of goods is at an end the instant the vendee has a right to interfere and exercise control over them; for, he has (except in a case of bankruptcy) such right the very moment the

vendor parts with the manual possession of them. In order to divest the consignor's right to stop them, the goods must have got into the actual possession of the consignee or his agent at their ultimate destination under the contract, or a new direction must have been given to them by the vendee—as in *Dixon v. Baldwin*, 5 East, 175, and *Morley v. Hay*, 3 M. & R. 396. In *Rows v. Pickford*, the goods had no known destination beyond the waggon office, which for this purpose was the warehouse of the vendee. In *Foster v. Frampton*, as also in *Leeds v. Wright*, 3 B. & P. 320, 4 Esp. 243, the delivery was complete. *Mills v. Ball*, 2 B. & P. 457, and *Coates v. Railton*, 6 B. & C. 422, 9 D. & R. 493, are precisely in point. In the former, A., living at N. in Devonshire, ordered goods of B., in London, who sent them by ship via Exeter, consigned to A., and advised him thereof. On their arrival at Exeter, the goods were delivered to C., a wharfinger, who received them on A.'s account, and paid the freight and charges. After their arrival, A. wrote to inform B., that, in consequence of his affairs being deranged, he should not take the goods, and telling him that they were at Exeter. At this time A. had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt. B. applied to C. for the goods, and tendered him the freight and charges due, upon which C. promised not to deliver them out of his custody, but afterwards did deliver them to the assignees of A. It was held that B. had a right to stop the goods in the hands of C., and might maintain trover against him for their value. And in *Coates v. Railton*, goods were purchased by a commission agent at Manchester for A., to be sent to Lisbon. A. had no warehouse at Manchester, and the vendor delivered the goods to the commission agent, who was to forward them to Lisbon: it was held that the transitus continued until the goods reached Lisbon, the place named by the vendee to the vendor as the place of ulterior destination, and that the

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latter had a right to stop them in the hands of the agent; the vendee having become insolvent. In *Stokes v. La Riviere*, 3 East, 397, n., under circumstances precisely the same as the present, Lord Mansfield says: "The Duhems bought goods of the plaintiff, which were ordered to be delivered to the defendants to be shipped to Duhems, who are since become insolvent, after the goods were sent to a factor at Ostend. The defendants who have got them back again stand as they originally did. No point is more clear than that if goods are sold, and the price not paid, the seller may stop them in transitu: *I mean in every sort of passage to the hands of the buyers.* There have been a hundred cases of this sort. Ships in harbour, carriers, bills, have been stopped. In short, where the goods are in transitu, the seller has that proprietary lien. *The goods are in the hands of the defendants to be conveyed; the owner may get them back again.*" [*Tindal*, C. J.—The stoppage in this case is not disputed by the vendee: what right, then, has this defendant to interpose?]

Second point.

2. The defendant is at all events bound by the engagement entered into by his clerk, to hold the goods subject to the order of the owners; any subsequent recognition of the act of Coates will entitle Nicholls to avail himself of the stoppage; and the defendant is not in a situation to urge an objection.

First point.

Bingham, in support of the rules.—1. What is the ultimate destination of the goods, is not always the question in cases of this sort. If any act of ownership is exercised upon the goods in any part of the journey, either by the consignee or his agent (other than a mere wharfinger or carrier), the transitus is at an end. Here, it is true, Guernsey was the place of ulterior destination of these goods, and not Southampton: but the defendant had a general authority from Le Couteur, the vendee, to take charge of all goods that might arrive for him at South-

ampton; and these goods were addressed to the care of the defendant. The goods arrived at Southampton on the 10th May, and, the waggoner's charges being paid by the defendant, they were shipped by the defendant on the 14th in obedience to the vendee's orders; and on the following day the vendee's instructions to delay the shipment were received. In *Mills v. Ball*, Lord Alvanley says: "If, in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them." So, in *Foster v. Frampton*, Bayley, J., says: "If the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession of them, the transitus is at an end." So, payment of warehouse rent by the vendee to the vendor (*Hurry v. Mangles*, 1 Camp. 452), or to a third person (*Wright v. Lawes*, 4 Esp. 82), the vendee's putting his mark upon the goods (*Ellis v. Hunt*, 3 T. R. 464), or taking samples from them (*Foster v. Frampton*), or the fact of their being shipped at a wharf where they have been delivered by the vendee (*Noble v. Adams*, 7 Taunt. 59, 2 Marsh. 366, Holt, 248), or by his agent (*Dixon v. Baldwin*, 5 East, 175): all these circumstances have been held to determine the transitus. Boutillier's letter was beyond the scope of his authority: and therefore the defendant is not bound by anything contained in it.

2. Then, as to Nicholls's goods, they were stopped without his authority: and the question is, whether, the subsequent ratification by him of this act of Coates, renders the latter the implied agent of Nicholls in the transaction. The doctrine of ratification has never yet been carried so far. The difficulties it would lead to are almost inconceivable. At least the ratification should come before

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the commencement of the action. If the defendant had delivered the goods to the present plaintiffs, he would have been liable in trover to Le Couteur, provided the latter did not assent to the act of Coates—*Wilson v. Anderton*,¹ B. & Ad. 450. The general principle is well laid down in *Doe d. Right v. Cuthell*, and confirmed by *Doe d. Mann v. Walters*. In *Doe d. Right v. Cuthell*, where a lease for twenty-one years contained a proviso, that, in case either landlord or tenant, or their respective heirs and executors, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing *under his or their respective hands*, the term should cease: it was held that a notice to quit signed by *two* only of *three* executors of the original lessor, to whom he had bequeathed the freehold as joint tenants, expressing the notice to be given *on behalf of themselves and the third executor*, was not good under the proviso, which required it to be given under the hands of all three; and, the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor would make it good by relation; nor was his joining in an ejectment evidence of his original assent to bind the tenant by the notice. Lord Ellenborough says: "The person to whom the notice is given ought to be assured at the time he receives it, and when he is to act upon it, that, if he deliver up possession at the end of the six months, he will be acquitted of all further claims in respect of the remainder of the term. But, if *two* only of the *three* joined in the notice, how could the defendant be assured of this? How could he be assured that the third might not disavow the notice afterwards, and claim the defendant still as a tenant to him?"^(a) [*Tindal*, C. J.—I should have felt the difficulty you put, had it appeared that the consignee had set up any claim.] That observation would have applied equally in *Right v.*

(a) See *Siffken v. Wray*, 6 East, 371.

Cuthell. The defendant had a right to know with certainty what particular course of conduct he could justify.

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TINDAL, C. J.—Had I felt the slightest doubt or difficulty in these cases, I should have desired to reserve the matters for further consideration. But I am of opinion that the special circumstances disclosed here leave untouched all the cases cited in the course of the argument. The first question is, was there a stoppage in transitu—was the transitus at an end? The answer to that depends upon what was the destination of the goods. It appeared from the evidence (and this is applicable to both cases) that one Le Couteur, a trader at Guernsey, purchased the goods in question, for the purpose of their being consigned to him there. The goods were accordingly packed and sent to the care of the defendant at Southampton. Resting there, one would suppose that the defendant was not in the general sense of the word an agent for Le Couteur, but merely the hand to forward the goods to Guernsey. But it is not left to us to conjecture what the authority of the defendant was; for, a letter of instructions was produced, dated the 14th August, 1830, by which the defendant was directed to take charge of and forward all goods that might arrive at Southampton for Le Couteur, whether addressed to the care of the defendant or of any other agent: and the general course of business appears to have been for the defendant, on the arrival of any goods at Southampton for Le Couteur, to take them from the wagon office (paying the charges), and to send them on to Guernsey. There was nothing to shew that the goods on arriving at Southampton received any new direction. It has been urged that this case is varied from the ordinary course by the fact of the carriage and warehouse charges at Southampton being paid by the defendant, and of his chusing the ship by which the goods were to be forwarded. The same thing, however, is done by every shipping agent.

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Upon this part of the case, therefore, I see nothing to take it out of the general rule. The destination of the goods according to the terms of the contract was Guernsey: consequently the transitus would be at an end (with reference to the facts of this case) only on their arrival at that place. There is one singularity in this case, which almost prevents the applicability of the doctrine of stoppage in transitu: we have not before us the party who usually disputes the right of the vendor to stop the goods; Le Couteur and the vendors are embarked in the same interest; both are anxious to affirm the stoppage: the defendant asserts a right of lien for a general balance due to him from Le Couteur. This gives rise to a second question, viz. whether such right of lien exists or not. That question, as it seems to me, depends upon the authority by which the goods were relanded, and whether or not they came back to the hands of the party who now claims the lien. The jury found that the goods were landed and taken to the defendant's warehouse for the purpose of awaiting the orders of the owners. The fact being so, there seems to me to be an end of all question as to Coates's authority to deal as he did with the goods of Nicholls. Whether or not a subsequent ratification of his act would suffice, it is unnecessary therefore to determine: but, if it would, the letter written by Nicholls demanding the goods, was an abundant confirmation of his authority. Upon the whole, I think that the jury came to a right conclusion, and that the rules for entering nonsuits should be discharged.

The rest of the court concurring, both rules were accordingly—

Discharged.

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Monday,
June 8th.

SHIRLEY v. JACOBS.

THIS was an action of assumpsit against the acceptor of a bill of exchange for 30*l*. Plea, that the defendant did not accept. At the trial before the Lord Chief Justice, at the Sittings at Guildhall after last Hilary Term, the defendant offered evidence, in reduction of damages, of payments on account amounting together to 11*l*. 15*s*. On the part of the plaintiff it was objected that this evidence could not be received under the plea of non acceptance—the rule of Hilary Term, 4 Will. 4, r. I, 3, requiring *payment* to be pleaded specially. His lordship admitted the evidence, and a verdict was found for the plaintiff for the balance, with 25*s*. for interest, making together 19*l*. 10*s*.

In assumpsit against the acceptor of a bill of exchange, part payment may be given in evidence under a plea denying the acceptance, in reduction of the damages.

Miller, in Easter Term, obtained a rule nisi to increase the damages to the whole amount of the bill and interest, on the ground urged at the trial.

Bompas, Serjeant, and *Mansel*, shewed cause.—Undoubtedly, according to the rule referred to, payment could not be given in evidence in bar or discharge of the action; but there is no reason why it should not be admissible (as offered in the present case) in reduction of damages. Suppose the whole amount of the bill were shewn to have been paid after the commencement of the action, could it be contended that the plaintiff would be entitled to judgment and execution for the entire amount? In assumpsit, the plaintiff does not necessarily recover the precise amount of the debt: it is for the jury to say what damages he has sustained by the non-payment. It is upon this principle that bills and notes have always been and still are (on judgments by default) referred to the Master or Prothonotary, to ascertain what is due for principal and interest. The point has already been decided (at Nisi

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Prius) by the Lord Chief Justice of this court, whose ruling was adopted by Lord Denman, C. J., in *Lediard v. Boucher*, 7 Car. & P. 1 (a), and by the Court of Exchequer yesterday (b). And in ——— v. *Padden Sewell's* Pr. Dig. 1835, p. 275, n., Patteson, J., in an action for use and occupation, held, that though a plea of payment, which operates as a bar to the action, is not supported by proof of payment of a smaller sum; yet that such evidence may be used in mitigation of damages.

Miller, in support of his rule.—Before the rules of Hilary Term, 4 Will. 4, part payment might in such a case as the present be given in evidence under the general issue, in reduction of the damages. But now, by the rule referred to, such a defence is required to be pleaded specially. It is even doubtful whether part payment is admissible in evidence under a plea in bar of payment generally. The rule in question puts payment and set-off upon the same footing in this respect, and it is perfectly clear that no set-off could be proved, in order to reduce the damages under a plea similar to that here pleaded.

TINDAL, C. J.—I take the meaning of the rule to be this, that payment cannot be given in evidence as an answer to the action, unless specially pleaded. In the present case, it was not so offered; but merely in reduction

(a) There, to a count for use and occupation, the defendant pleaded non assumpsit; and, at the trial, evidence was offered of partial payments. On the part of the plaintiff it was contended, that, since the rules of Hilary Term, 4 Will. 4, the general issue, in an action for use and occupation, merely puts in issue the fact of the occupation, and payment must be

specially pleaded. Lord Denman, C. J., said: "I take the rule of Hilary Term, respecting payment, to mean a complete payment which is an answer to the action, and not a partial payment, which merely goes to the amount of the damages."

(b) *Cousins v. Paddon* is probably the case here alluded to: see the report, 2 C. M. & R. 547.

of damages. Whether the plea be the general issue or a special plea, the jury would have two points to inquire into—first, for whom the issue was to be found—secondly, what damages the plaintiff had sustained. The damages the plaintiff in this case would be entitled to, would be that portion of the bill which remained unpaid. As, before the new rules, the defendant was always entitled to prove under the general issue payment (even after issue joined) in reduction of damages, so now I cannot see why anything should be withheld from the jury that goes to reduce the amount of the verdict. It would be a very singular thing if, when a bill is put in, and the jury see indorsements of part payments on the back of it, they must still upon their oath say that the full amount of the bill remains due to the plaintiff. In the case of a judgment by default, and an assessment of damages before the sheriff, nobody doubts but that payment might be proved in order to reduce the verdict. I think therefore this rule must be discharged.

PARK, J.—Although I on one occasion decided otherwise at the last Assizes (c), for the reasons given by his lordship, I concur in the judgment he has pronounced.

GASELEE, J.—It would be absurd to put a construction on this rule different from the old practice. Suppose the whole debt to have been paid after issue joined, might not the defendant have shewn that under the present plea?

(c) The learned judge probably alluded to the case of *Palfrey v. Sill*, Hereford Spring Assizes, 1835. That was an action of *assumpsit* for a veterinary surgeon's bill. Plea—non *assumpsit*. At the trial, it was proposed, on the part of the defendant, to give evidence of a

payment of 50*l.* on account. Park, J., after conference with Coleridge, J., intimated an opinion that the proposed evidence was not admissible under non *assumpsit*. The plaintiff had a verdict for his whole demand: but ultimately he consented to reduce it by the 50*l.*

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VAUGHAN, J.—I am also of opinion that the rule should be discharged. According to the letter and spirit of the rule, it would seem clearly to apply only to matters that go to the root of the action. It provides, that, “in every species of assumpsit, all matters in *confession and avoidance*, including not only those by way of *discharge*, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; ex. gr. infancy, coverture, release, *payment*, set-off, &c., &c.” enumerating various examples, the whole of which go to the foundation of the action.

Rule discharged (*d*).

(*d*) The object of this motion was, to increase the damages to a sum that would justify the arrest of the defendant; there being a rule pending for allowing the defen-

dant his costs under the 43 Geo. 3, c. 46, s. 3, the arrest being without reasonable or probable cause, which rule was on a subsequent day in this term made absolute.

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HEATH v. MILWARD.

Monday,
June 8th.
 In trespass for breaking and entering the plaintiff's close, the defendant pleaded that the close was not the close of the plaintiff:—
 Held, that evidence of possession was sufficient to entitle the plaintiff to a verdict.

TRESPASS for breaking and entering the plaintiff's close, situate &c., abutting &c., and there destroying and spoiling the grass and herbage of the plaintiff there then growing and being, and also then felling, cutting down, &c., divers bushes, trees, and hedges of the plaintiff there then growing and being, and carrying away the same, &c.
 Pleas—1. not guilty—2. that the close was not the plaintiff's, nor were the trees, grass, and herbage, bushes, &c., the trees &c. of the plaintiff modo et formâ—3. that the close was the close, soil, and freehold of the defendant. The plaintiff joined issue on the first and second pleas, and traversed the title set up by the third. At the trial before Lord Denman, C. J., at the last Assizes for Surrey,

the following facts appeared in evidence:—The close in question was a narrow slip, containing about three quarters of an acre, situate between a field and a coppice, both of which were the freehold of the plaintiff. Proof of possession in the plaintiff, and of acts of trespass by the defendant, was given. On the part of the defendant it was attempted to be established, that the locus in quo was originally a part of the waste of the manor; that, one Worham had about forty years ago inclosed it adversely to the lord, and had possession of it for twenty years and upwards; and that Worham by deed of June, 1834, conveyed it to the defendant. But it appeared, that, at the time Worham so inclosed the land in question, he was tenant of the farm (now the property of the plaintiff, and including the field and coppice on either side of the slip); that his tenancy expired about eleven years ago, when he was succeeded in the occupation of the farm by his son; that Worham the younger used the spot in question as part of the farm until the end of his tenancy (about eighteen months since), without any interruption from Worham the elder; and that the plaintiff (who had purchased the farm during the tenancy of Worham the younger) had himself, in like manner, and without interruption, occupied it with the rest of the farm from the determination of the tenancy of Worham the younger. It was therefore contended, on the part of the plaintiff, that, in the absence of any proof of title in the lord of the manor, the presumption of law was that the close was the plaintiff's: and it was further submitted, that the second plea did not put in issue the title to the freehold, but only the fact of the plaintiff's possession of it. His lordship thought that the plaintiff was bound, under the issue taken on the second plea, to prove his title to the freehold; but he reserved the point: and he left it to the jury to say—first, whether or not the plaintiff had given sufficient evidence of possession of the locus

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in quo to entitle him to maintain the action—secondly, whether the close was the property of the plaintiff—thirdly, whether it was the property of the defendant. The jury said they did not know whose land it was; but that it belonged neither to the plaintiff nor to the defendant. His lordship thereupon directed a verdict to be entered for the plaintiff upon the first and third issues, and for the defendant upon the second, with leave to the plaintiff to move to enter the verdict for himself on the second issue also.

Channell now moved accordingly.—The second plea puts in issue only the fact of possession. According to the old rules of pleading, where the plaintiff shewed possession in himself of the locus in quo, in order to justify an act of trespass, the defendant was bound to aver and prove affirmatively title in himself, or title in a third party under whose command he acted. This plea avers no title either in the defendant or a third party. [*Vaughan J.*—Should you not have demurred?] If, as we say it does, the plea puts in issue the fact of possession, we could not demur. [*Tindal, C. J.*—You maintain that all the plaintiff has alleged in his declaration is, *possession*; and that the plea traverses no more?] Precisely so. The plea, too, contains language that is not usually introduced into a plea claiming the soil and freehold. A rule nisi having been granted—

Andrews, Serjeant, and *Petersdorff*, shewed cause.—By the 2nd rule of Hilary Term, 4 Will. 4, *Trespass, V.*, it is provided, that, “in all actions of trespass quare clausum fregit, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff’s possession or right of possession of that place, which, if intended to be denied, must be traversed specially.” It was evi-

dently intended by the second plea to put in issue the plaintiff's title: and it is difficult under the above rule to perceive how it could be otherwise done. The declaration states that the defendant broke and entered *the plaintiff's close*. These words alone involve an assertion of property—Doctor and Student, p. 30: and *Savel's* case, 11 Rep. 55. a., is an authority to shew that ejectment will lie for a close, provided it be properly described. In *Samuel v. Morris*, 6 C. & P. 620, where in trover the defendant pleaded that the goods “are not nor were the *property* of the plaintiff in manner and form as in the declaration was alleged,” it was held that, though informal, this plea raised the question of right of possession as well as that of right of property. Here, the plea is in substance and effect a denial of the plaintiff's property in the close; and, if an insufficient denial, yet it is aided by the verdict; and therefore it is now too late to take the objection.

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TINDAL, C. J.—I think the second plea in this case was intended to deny the plaintiff's *possession* of the close in dispute between the parties. That the word close may not only mean the inclosure, but may embrace the *property* also, may be admitted. But words must always be understood in the sense in which they are used. We must therefore endeavour to discover the intention of the parties. Now, it seems to me to be perfectly clear, that, when the plaintiff used the word “close” in his declaration, he did not intend thereby to burthen himself with a larger degree of proof than the purposes of the action required. Possession alone will suffice to sustain an action of trespass against a wrongdoer. Why, then, should we suppose that the defendant, when he used the same word, used it in a larger sense than the plaintiff did? He knows how to apply the word to a claim of interest or property: for, in his third plea, he affixes the proper meaning to it,

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when he says that the locus in quo was "the close, soil, and freehold of him the defendant." It has been suggested that the new rule that has been referred to precludes the defendant from alleging new matter in answer to the charge contained in the declaration. But, I see no objection under that rule to the defendant's averring that the close was not in the possession of the plaintiff, or to his using the word *property*, which is analogous to *possession*. I therefore think this rule must be made absolute.

PARK, J.—I am of the same opinion. The word "close," no doubt, is sometimes used to denote the degree of interest of the party, as well as possession. But it is evident here that the defendant knows the proper application of the word; for, where he intends it to refer to possession only, he uses it in the same sense in which the plaintiff has used it; but where (in his third plea) he means to apply it to an interest, he uses it in conjunction with the proper words—"close, soil, and freehold."

The rest of the court concurring—

Rule absolute.

Tuesday,
 June 9th.

GREEN v. BEESLEY.

It was agreed between the plaintiff and defendant that the former should convey by horse and cart the mail from N. to B., and receive 9*l.* per mile per

annum, by quarterly payments—provided always that the said agreement in that and every subsequent article should be punctually and properly fulfilled: and it was further agreed that the plaintiff should pay to the defendant 18*l.* for one cart then in use for the above purpose, and should also pay a proportion of repairs of carts; and that the monies received for the conveyance of parcels should be equally divided, each party bearing an equal portion of the loss, if any, occasioned by loss or damage of such parcels:—Held, that this agreement constituted a partnership between the plaintiff and defendant, and that the mileage was an item in the partnership accounts.

THE declaration stated, that, on the 29th January, 1827, it was agreed between the plaintiff and defendant as follows, viz. the said plaintiff agreed to horse, that is to say, to convey by horse and cart, the mail from Northampton to Brackley, and back again from the latter place to

Northampton, punctually and within the time as near as might be, to be paid for such performance at and after the rate of 9*l.* sterling per mile per annum; and the defendant agreed to pay or cause to be paid unto the plaintiff the sum of 9*l.* per mile per annum (rateable), the same to be paid at the expiration of each quarter of a year, from the commencement of the said agreement; provided always that the said agreement, in that and every subsequent article, should be punctually and properly fulfilled: and it was further agreed on the part of the plaintiff to pay for one cart then in use for the above purpose the sum of 18*l.*, the same to be paid into the hands of the defendant forthwith: and the plaintiff further agreed to pay for, in a fair proportion with the defendant, all repairs or replacing of carts, so long as that agreement should be in force. It was also agreed that the monies received for the conveyance of all packages or parcels should be fairly and equally divided between the two parties, each bearing an equal portion of the loss (if any) occasioned by loss or damage of such or any such packages or parcels: and it was further agreed that one quarter's notice should be required and given by either party desirous of discontinuing the said agreement, before either should be absolved from his or their engagement. Mutual promises; averment of performance on the part of the plaintiff; and that he had always since the making of the agreement fairly and equally divided with the defendant all monies received by him, the plaintiff, for the conveyance of all packages and parcels, and had borne an equal proportion of all losses or damage occasioned by loss or damage of all such packages or parcels which during the time aforesaid were lost or damaged. Breaches—first, that the defendant had not paid or caused to be paid to the plaintiff the said sum of 9*l.* per mile per annum, rateable, at the expiration of each quarter of a year from the time of the commencement of the said agreement; and

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Proviso.

First breach.

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that there was due and owing from the defendant to the plaintiff for the conveyance of the said mail from Northampton aforesaid to Brackley, and back again from the latter place to Northampton, the sum of 180*l.* for four quarterly payments of the said sum of 9*l.* per mile per annum, rateable, as in the said agreement mentioned—

Second breach.

secondly, that the defendant had not, since the making of the said agreement and promise and undertaking of the defendant as aforesaid, fairly and equally divided between himself, the defendant, and the plaintiff, the monies received by the defendant, his agents and servants, for the conveyance of packages and parcels, after deducting an equal portion of losses occasioned by the loss or damage of any such packages and parcels, but had wholly neglected and refused so to do.

Demurrer.

Demurrer and joinder.

S. B. Harrison, in support of the demurrer, submitted, that, inasmuch as the agreement declared upon disclosed a partnership between the plaintiff and defendant (not a joint interest in the *gross* proceeds, but each receiving and bearing an equal proportion of the profits and losses, *Dry v. Boswell*, 1 Camp. 330), and no account having been taken between them, or balance ascertained, the action was not maintainable. [The court called upon—

Merewether, Serjeant, to support the declaration.—To constitute a partnership between two individuals, there must be a communion of profit: the interest in the profit must be mutual; that is, each must have a specific interest in the profits as a principal trader; if one merely receives out of the profits a compensation for his trouble in the character of an agent or servant of the concern, he is not a partner—*Hesketh v. Blanchard*, 4 East, 144, and per Lord Ellenborough in *Dry v. Boswell*. In *Wish v. Small*, 1 Camp. 331, n., where A. had purchased two bullocks,

and had put them to depasture on the lands of B., and it was agreed "that the profits to be made upon the resale (after they had been fatted on B.'s land), above 20*l.*, at which A. had valued them, should be equally divided between him and B.;" it was ruled that this agreement did not make A. and B. partners, but merely fixed the mode of paying B. for the pasture: and this ruling was afterwards confirmed by the court. So, in *Mair v. Glennie*, 4 M. & S. 240, it was held that the captain of a ship, who, instead of receiving wages, is to share in the profit and loss of the adventure on which he sails, is not a partner with the owner. The circumstances of that case were these:—Mair was the owner of a ship and cargo: the captain by agreement was to have, in lieu of all wages, primage, &c., one fifth share of the profit *or loss* of the intended voyage, on ship and cargo, and was to follow Mair's instructions, do all the business himself that he could do, and, for the rest, make the best bargain he could. The ship sailed, and afterwards, Mair, being indebted to S. & Co., executed to them a bill of sale of the ship; but S. & Co. never took *actual* possession of the ship, though it was argued for them that they had, by means of this transfer, and notice thereof to the captain, the *virtual* possession. Mair and S. & Co. afterwards became bankrupts; and in an action of assumpsit by the assignees of the former against the assignees of the latter, the question was, whether, under the circumstances, Mair, when he became bankrupt, had the possession, order, and disposition of the ship and cargo, within the 21 Jac. 1, c. 19. On behalf of the assignees of S. & Co., it was urged that it was out of their power to take actual possession, for, by the agreement between Mair and the captain, the latter was interested in ship and cargo to the extent of one fifth, in respect of which S. & Co. could not have divested him of the possession. Lord Ellenborough said: "One of the points which has been raised in this

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case is—supposing in other respects it was proper for S. & Co. to take possession, whether they were precluded from doing so, in respect of the captain's interest. And upon this point it has been contended that the captain was virtually a partner: but, upon what ground has it been so contended? The ground is, because payment of the captain's wages was to depend, as to its amount, upon a reference to the value of the cargo; but, according to that mode of argument, every seaman in a Greenland voyage would become a partner in the fishing concern. There is no pretence, therefore, for saying that the captain was a partner because his wages were to be regulated and paid by reference to a calculation on the profits of the adventure." So, in *Hesketh v. Blanchard*, where A. purchased goods for an adventure on the credit of B., and it was agreed, "that, if any profit should arise from them, B. should have one half for his trouble; it was held that this was not a partnership between them. "The distinction taken in *Waugh v. Carver*, 2 H. Bl. 235," says Lord Ellenborough, "applies to this case: quoad third persons, it was a partnership; for, the plaintiff was to share half the profits: but, as between themselves, it was only an agreement for so much, as a compensation for the plaintiff's trouble, and for lending Robertson his credit." [*Tindal*, C. J.—In that case the parties were not equally to bear any loss that might attend the adventure.] The present case comes strictly within the principle established by these authorities: the agreement points out a mere mode of payment for services. At all events, the two parts of the agreement may be taken separately and independent of each other; and, if the latter part of the contract does constitute a partnership between them, the former part is free from the objection, and is sufficient to sustain the action.

TINDAL, C. J.—Two breaches of this agreement are assigned in the declaration—the one, the nonpayment by

the defendant to the plaintiff of 180*l*. for four quarterly payments of 9*l*. per mile per annum for horsing the mail cart from Northampton to Brackley and back ; the other, for not accounting for and dividing the monies received by the defendant for the conveyance of packages and parcels, after deducting losses. It appears to me, that, if the first stipulation in the agreement had stood alone, unconnected with the latter part, an action might have been maintained for the breach of it ; for, if it had not been made by the proviso to depend upon the contingency of every subsequent article in the agreement being punctually and properly fulfilled, it would have amounted to no more than a stipulation for a dry annual payment. From the subsequent part of the agreement, it seems to me to be impossible to fail to perceive that the intention of the parties was that this payment of 9*l*. per mile per annum should form an item in the account between them ; that if, on balancing the account, it should be found that a loss had happened, it was not intended that the defendant should pay the plaintiff the mileage, and afterwards get back from him his share of the loss. The agreement states " that the monies received for the conveyance of all packages and parcels shall be fairly and equally divided between the two parties, each bearing an equal portion of the loss, if any, occasioned by the loss or damage of such or any such packages or parcels." This is a substantive agreement for a mutual participation in profits and losses, which is precisely what I have always understood to be the true definition of a partnership. The plaintiff and defendant therefore being partners, according to the construction that I put upon the latter part of the agreement, and the 9*l*. per mile per annum being to be paid on the punctual and proper fulfilment of the rest of the stipulations, I think the whole agreement is so incorporated together as to render it impossible to separate the

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first from the second breach : and the latter is clearly the subject matter of a bill in equity, and not of an action at law.

PARK, J.—I am of the same opinion. I have always understood that a mutual participation in the profit and loss of a concern makes the parties partners. I agree that the first part of the agreement in this case, had it stood alone, might have been enforced by action : but the proviso draws it down to and incorporates it with the subsequent stipulations, which clearly point to a partnership. *Foster v. Allanson*, 2 T. R. 479, was the first case that decided that one partner might maintain an action against his co-partner to recover the ascertained balance due to him on the partnership account; and that was at first looked upon as a singular and unsatisfactory decision. In the late case of *Fromont v. Coupland*, 9 Mo. 319, 2 Bing. 171, 1 C. & P. 275, where two persons were engaged in running a coach, one of them finding horses for one part of the road, and the other for another part, and the profits of each party were to be calculated according to the number of miles covered by his own horses, and one party received the fares and rendered an account thereof to the other every week : it was held that they were partners.

GASELEE, J., signified his concurrence.

BOSANQUET, J.—It appears to me that this was an agreement between the plaintiff and defendant to carry on business in partnership together. The first breach is assigned upon a clause that was intended apparently to operate entirely for the benefit of the plaintiff. But, by the proviso immediately following, the annual payment stipulated for by that clause is made subject to the general account of profit and loss of the whole concern.

The consequence is, that no action at law can be maintained upon the agreement by the one party against the other.

Judgment for the defendant.

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GROOM and Others, Assignees of GEORGE DIACK, a
Bankrupt, v. MEALEY.

*Wednesday,
June 10th.*

DEBT. The declaration stated, that, on the 1st January, 1835, the defendant was indebted to the plaintiffs as assignees as aforesaid in 100*l.* for money before then received by the defendant for the use of the plaintiffs as such assignees as aforesaid; and in 100*l.* for money then found to be due from the defendant to the plaintiffs as such assignees as aforesaid, on an account then stated between the defendant and the plaintiffs as such assignees as aforesaid: by means whereof, and of the same two several sums of money being and still remaining due and wholly unpaid, an action had accrued to the plaintiffs, as assignees as aforesaid, to demand and have of and from the defendant the same two several sums of money, making together the sum of 200*l.*: yet the defendant, though often requested so to do, had not as yet paid the said sum of 200*l.*, or any part thereof, to the plaintiffs, assignees as aforesaid, but he to do this had hitherto wholly refused, and still did refuse, to the damage of the plaintiffs, as assignees as aforesaid, of 100*l.* &c.

To a count in debt by the assignees of a bankrupt for money had and received by the defendant to the use of the plaintiffs as assignees (not stating whether received before or since the bankruptcy), the defendant pleaded a set-off for money due to him on an account stated with the bankrupt before his bankruptcy:—Held, that the plea was bad, for that it did not shew that the debts were mutual.

Plea—that the said George Diack, before and at the time of his becoming bankrupt, was indebted to the defendant in 300*l.* for money before then found to be due from the said George Diack to the defendant, upon an account before then stated between them, which said sum of 300*l.* was still wholly unpaid, and the plaintiffs, as assignees as aforesaid, before and at the commencement of this suit were and still are indebted to the defendant in the

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amount thereof ; and which said sum of money so due from the plaintiffs, as assignees as aforesaid, to the defendant, exceeded the amount of the debt owing from the defendant to the plaintiffs, as assignees as aforesaid ; and the defendant thereby offered to set off and allow to the plaintiffs, as such assignees, the full amount of the said debt out of the debt so owing from the plaintiffs, as assignees as aforesaid, to the defendant, according to the form of the statute in such case made and provided : and this the defendant was ready to verify ; wherefore &c.

Demurrer.

Demurrer—For that the debt in and by the plea attempted to be set off, and the debts to which the said set-off was pleaded respectively, were not mutual debts, nor due to the parties respectively in the same right or character, in this, to wit, that the debt so attempted to be set off appeared in and by the plea to have been due from G. Diack to the defendant before Diack became a bankrupt, and the debts to which the same was attempted to be set off were pleaded and shewn to have been contracted with the plaintiffs, as assignees as aforesaid, since the said bankruptcy : and also that no debt capable of being set off in this action was in any way shewn in or by the plea, in this, to wit, that a debt due from the plaintiffs in their private capacity could not by law be set off against a debt contracted with them as assignees as aforesaid ; and that a debt due from the bankrupt before his bankruptcy, and remaining unpaid, did not by law become a debt due from his assignees ; and that the plaintiffs in their political capacity as assignees could not by law become indebted as in the plea alleged : and also for that &c.

Joinder.

The defendant joined in demurrer.

J. Henderson, in support of the demurrer.—The plea is bad. In order to entitle a defendant to a set-off, the two debts must be mutual ; the debt to be set off must be due in the same right as that against which it is sought

to set it off, and the claim must be one for which the defendant would be entitled to maintain an action against the plaintiffs: therefore, a debt due from a bankrupt before his bankruptcy cannot be made the subject of a set-off against a debt accruing from the defendant on a contract with the assignees since the bankruptcy—*Ridout v. Brough*, Cowp. 133.

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Mansel, contra.—The declaration is for money had and received by the defendant to the use of the assignees (not alleging it to have been received since the bankruptcy), and upon an account stated with the plaintiffs as assignees since the bankruptcy. Non constat that the money was not received by the defendant before the bankruptcy of Diack; in which case it might still be money remaining in the hands of the defendant for the use of the assignees after the bankruptcy of Diack. The plea, therefore, alleging the bankrupt to have been indebted to the defendant before his bankruptcy, is well pleaded: for, every debt capable of proof under the commission may (by s. 50 of the 6 Geo. 4, c. 16) be the subject of a set-off.

J. Henderson, in reply.—If the money were received since the bankruptcy, it clearly was not a debt against which the defendant could claim a set-off; and, if received before the bankruptcy, in order to become money received to the use of the assignees, it must have been received by way of fraudulent preference: in either case, therefore, it would be a debt due to the assignees.

TINDAL, C. J.—The question is, what is the import and meaning of the right in which the plaintiffs claim this money. The declaration alleges that the defendant is indebted to the plaintiffs as assignees in 100*l.* for money received by the defendant for the use of the plaintiffs as such assignees. *Primâ facie*, this imports money received

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by the defendant *since the bankruptcy*. It is true that money received *before* the bankruptcy might under some circumstances be money received to the use of the assignees. But, inasmuch as the plea does not affect to give any answer to a case where the defendant would have no right of set-off, I think it is bad. If the money were received after the bankruptcy, or by way of fraudulent preference before the bankruptcy, it would equally be money received to the use of the assignees, and therefore not a debt against which the defendant could set off money due to him from the bankrupt. The plea affects to be a general answer: it should have alleged that the money was received before the bankruptcy, and then the set-off would have been applicable.

The rest of the court concurring—

Judgment for the plaintiff.

Wednesday
June 13th.

ELLIOTSON v. FEETHAM and Another.

In case for a nuisance, the declaration stated that the plaintiff was possessed for the residue of a term of a messuage, and that he was disturbed in its enjoyment by the alleged nuisance. The defendants pleaded that they were possessed of their workshops and manufactory (the nuisance complained of) for ten years before the plaintiff became possessed of his term. The plaintiff replied that the term whereof he held the residue was created four years before the defendants were possessed of their said workshops and manufactory:—Held, on demurrer, that the plea was bad: the defendants should at least have alleged an user for twenty years.

CASE for a nuisance. The declaration stated that the plaintiff before and at the time of committing the grievance thereafter mentioned, was, and from thence hitherto had been and still was lawfully possessed, for the rest and residue of a certain term whereof eleven years and upwards were yet to come and unexpired, of a certain messuage or dwelling-house, with the appurtenances, situate in the parish of St. George, Hanover Square, in the county of Middlesex, in which said messuage or dwelling-house, with the appurtenances, the plaintiff and his family during all the time aforesaid inhabited and dwelt; and that the plaintiff had for and during all the time aforesaid used, exercised, and carried on, and still did ex-

The plaintiff replied that the term whereof he held the residue was created four years before the defendants were possessed of their said workshops and manufactory:—Held, on demurrer, that the plea was bad: the defendants should at least have alleged an user for twenty years.

ercise and carry on the profession of doctor of medicine and physician at and in the said messuage or dwelling-house; that the defendants, before and at the time of committing the said grievance, and from thence hitherto, were possessed of certain workshops, and of a certain manufactory for the working of iron, and for the making and manufacturing of ironmongery goods, situate near to the said messuage or dwelling-house with the appurtenances of the plaintiff: nevertheless, the defendants, being so possessed of the said workshops and manufactory, and well knowing the premises aforesaid, but contriving and wrongfully and unjustly intending to injure the plaintiff, and to interrupt, disturb, disquiet, and annoy him and his family in the peaceable and quiet possession, use, occupation, and enjoyment of the said messuage or dwelling-house, with the appurtenances, and also to injure, interrupt, and disturb him in the exercise of his profession aforesaid, whilst the plaintiff was so possessed of his said messuage or dwelling-house, with the appurtenances, and so inhabited and dwelt therein with his family, and whilst he so used, exercised, and carried on his said profession therein as aforesaid, to wit, on the 20th July, 1831, and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly made and caused to be made in their said workshops and manufactory divers large fires, and also divers loud, heavy, jarring, varying, agitating, hammering, and battering sounds and noises, although they, the defendants, were on those several days and times aforesaid urged and requested to desist therefrom: by means of which said several premises the plaintiff and his family were greatly disturbed and disquieted, incommoded, interrupted, and annoyed in the peaceable and quiet possession, use, occupation, and enjoyment of the said messuage or dwelling-house, with the appurtenances; and the said messuage and premises of the plaintiff had been and were by means

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of the several premises aforesaid greatly lessened in value; and also by means of the said several premises the plaintiff for and during all the time aforesaid had been greatly disturbed, interrupted, and prevented from exercising and carrying on his said profession in so ample and beneficial a manner as he otherwise might and would have done.

Plea.

The defendants pleaded—that they were possessed of their said workshops and manufactory in the declaration mentioned, long, to wit, for the space of ten years, before the plaintiff became possessed of his said term of and in the said messuage or dwelling-house, with the appurtenances, in the declaration mentioned; and that the defendants always from the time at which they so became possessed of their said workshops and manufactory down to and until the plaintiff so became possessed of his messuage or dwelling-house with the appurtenances as aforesaid, used, exercised, and carried on the said trade and business of ironmongers, and worked iron, and made and manufactured ironmongery goods, in their said workshops and manufactory, without any let, suit, interruption, molestation, or complaint, by or on the part of the owners or occupiers of the said messuage or dwelling-house now of the plaintiff; and that the defendants, from the time the plaintiff so became possessed of his said messuage or dwelling-house, hitherto, had continued to use, exercise, and carry on the said trade and business of ironmongers, and to work iron, and make and manufacture ironmongery goods in their said workshops and manufactory, in the same manner as they had always, from the time of their becoming possessed of their said workshops and manufactory, down to and until the time when the plaintiff so became possessed of his said messuage or dwelling-house, been used and accustomed to do, and without making or causing to be made in their said workshops and manufactory larger fires, or louder, heavier, more jarring, varying, or agitating, hammering, or battering sounds or noises

than the defendants had during all the previous time been accustomed to do, or than were necessary and requisite to enable them to carry on their said trade and business in and upon their said workshops and premises, in the same manner as they had always theretofore been used and accustomed to do.

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The plaintiff replied—that, though true it was that the defendants were possessed of their said workshops and manufactory in the declaration mentioned before the plaintiff became possessed of his said term of and in the said messuage or dwelling-house, with the appurtenances, in the declaration also mentioned; nevertheless, such term as aforesaid was created and granted long, to wit, for the space of four years, before the defendants were possessed of their said workshops and manufactory in the declaration mentioned, and before they used, exercised, or carried on the said trade and business of ironmongers, and worked iron and made and manufactured ironmongery goods therein as aforesaid; and that the defendants, since the plaintiff became possessed of the said term of and in the said messuage or dwelling-house, with the appurtenances, as aforesaid, to wit, on the several days and times in the declaration mentioned, committed the said several grievances therein mentioned and above complained of.

Replication.

Demurrer and joinder.

Demurrer.

Hoggins, in support of the demurrer, submitted that the plaintiff had no right of action, inasmuch as it appeared from the whole record that he came to the alleged nuisance. He ought to have averred that he was possessed of the premises at the commencement of the nuisance of which he complains—*Leeds v. Shakerly*, Cro. Eliz. 751.

TINDAL, C. J.—When a man purchases a lease, he takes it with all the rights incident to it. Twenty years' user would legalize the nuisance: the defendants ought (if the fact be so) to have averred it.

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Hoggins prayed leave to amend the plea in that respect.

PER CURIAM.—On payment of costs, pleading forthwith, and undertaking to go to trial at the Sittings after term, and within three days producing an affidavit verifying the fact in respect of which the amendment is sought, the defendants may be permitted to amend.

No affidavit having been produced—

Judgment for the plaintiff (a).

(a) See *Moor v. Brown*, Roll. 402, *Some v. Barwish*, Cro. Jac. Rep. 319, *Dyer*, 319. b., *Jenk. Cent.* 6, 260, *Penruddock's case*, 5 Rep. 101, *Aldred's case*, 9 Rep. 59. a., *Bradley v. Gill*, 1 Lutw. 70, *Westburne v. Mordaunt*, Cro. Eliz. 191, *Beswick v. Cunden*, Cro. Eliz. 402, *Some v. Barwish*, Cro. Jac. 231, *Ryppon v. Bowles*, Cro. Jac. 373, *Brent v. Haddon*, Cro. Jac. 555, *Com. Dig.* Action upon the Case for Nuisance, A., C., E. 2., *Rex v. Cross*, 3 Camp. 226, 3 C. & P. 483, *Mason v. Hill*, 3 B. & Ad. 312.

Friday,
June 12th.

A plea to an action on an attorney's bill, that no signed bill has been delivered pursuant to the statute, is not a plea to the merits.

Whether such a defence would avail under non assumpsit, or must be pleaded specially—
Quærs.

BECK, Gent., one &c., v. MORDAUNT.

TO an action on an attorney's bill, the defendant pleaded—1. non assumpsit—2. that no signed bill had been delivered pursuant to the statute—3. a composition between the defendant and his creditors, to which the plaintiff was a party—4. a set-off. These pleas not having been signed by counsel, the plaintiff signed judgment. Upon application to Bosanquet, J., at chambers, with an affidavit of merits, the judgment was set aside. The defendant again delivered the same four pleas. After retaining them for twenty-two days, the plaintiff applied to Park, J., at chambers, to strike out the second plea, on the ground that it was not a plea to the merits. That learned judge, on the authority of *Holmes v. Grant*, Hilary Term, 4 Will. 4, made an order to that effect.

W. H. Watson obtained a rule nisi to rescind this order.

Stephen, Serjeant, and *Waddington*, now shewed cause (a).—Before the new rules it was not necessary to plead that no signed bill was delivered; and it is by no means certain that it is necessary now. At all events, it is not a plea to the merits, or one that a defendant ought to be allowed to plead after setting aside a regular judgment on an affidavit of merits. *Holmes v. Grant* is precisely in point.

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W. H. Watson, in support of his rule.—The legislature, for the protection of the client, has (by the 2 Geo. 2, c. 23, s. 23) provided that “no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more after he shall have delivered unto the party charged therewith, or left for him at his dwelling-house or last place of abode, a bill of such fees &c., subscribed with the proper hand of such attorney or solicitor.” A plea of non-delivery of a bill in pursuance of the statute is therefore clearly a plea to the merits. Parke, B., at the last Assizes at Durham, in a case of *Moore v. Dent*, ruled that such a defence must be specially pleaded. Besides, the plaintiff ought to have made the objection earlier.

TINDAL, C. J.—It appears to me to be perfectly clear that this is not a plea to the merits. The case of *Holmes v. Grant* is precisely in point. The only effect of the plea, if allowed, would be to render useless the expense the plaintiff has already incurred, and to compel him to commence a fresh action. The defendant having been let in only to plead to merits, he ought not to have pleaded such

(a) The affidavits upon which cause was shewn stated that the larger part of the plaintiff's demand consisted of items not taxable, and that a bill (not signed) had been delivered three months before the commencement of the action, and not objected to.

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a plea. All that can be urged on the other side is, that there has been unreasonable delay on the part of the plaintiff in seeking to be relieved from this plea. That might be an answer to the motion if that which is complained of were a mere irregularity. But it seems to me that this is something more than an irregularity: the plea ought never to have been placed upon the record. We are therefore not so bound by the delay as to prevent the cause standing in the position in which it ought to stand upon its merits. The rule for setting aside the order of my Brother Park must be discharged; but, on account of the delay in making the application at chambers, it will be discharged without costs.—With respect to the suggestion that the non-delivery of a signed bill must be specially pleaded, though I give no opinion upon it, it cannot but be observed that the same argument would apply to the statute of frauds, under which nobody doubts that the plaintiff would be bound to prove, in order to support his action, that the contract was in writing.

PARK, J.—I am also of opinion that this case is governed by *Holmes v. Grant*. I must say I by no means accede to the opinion said to have been expressed by Parke, B., in *Moore v. Dent*, inasmuch as the plaintiff must be nonsuited unless he is prepared to shew that he has complied with the statute, in the delivery of a signed bill a month before the commencement of the action.

GASELEE, J., concurred.

VAUGHAN, J.—I concur with the rest of the court in thinking that this rule should be discharged. But, upon the question as to whether or not the non-delivery of a signed bill according to the statute must form the subject of a special plea, I reserve my opinion.

Rule discharged, without costs.

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Saturday,
June 13th.

DOE d. THOMPSON v. ROE.

ON behalf of a party who claimed to be the landlord of the premises for which this ejectment was brought (but not shewing how or when he became landlord), after judgment (and execution) for the lessor of the plaintiff—

In the absence of any suggestion of collusion between the lessor of the plaintiff and the tenant, the court will not set aside a regular judgment in ejectment, in order that the landlord may be let in to defend.

Atree, on a former day, obtained a rule calling upon the lessor of the plaintiff to shew cause why the judgment should not be set aside, and he (the applicant) admitted to defend.—The affidavit upon which the motion was founded, stated that the landlord did not know or believe, nor had he any reason to believe, that a declaration in ejectment had been served on the tenants in possession; and that he was advised and believed that he had, as such landlord as aforesaid, a good title to the premises, and a good defence to the action, on the merits.

Bompas, Serjeant, shewed cause.—He produced an affidavit negating collusion between the lessor of the plaintiff and the tenants: and he relied on *Doe d. Ledger v. Roe*, 3 Taunt. 506, and *Goodtitle v. Badtittle*, 4 Taunt. 820, as authorities to shew that the courts will not, after the lessor of the plaintiff has obtained judgment and possession in an undefended ejectment, in the absence of collusion, let in a party to defend who claims to be landlord, or from whom his tenants had concealed the ejectment. “If,” said the court, in *Goodtitle v. Badtittle*, “the lessor of the plaintiff had colluded with the landlord’s tenant, we could have interfered. But here the case is the same as if the tenant had delivered over the possession wrongfully to another person. The landlord must bring an action of ejectment to recover it. How can we deal with the lessor of the plaintiff? He has not been to blame. If your tenant has done you wrong, that is only a matter between him and you.”

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 DOE
 d.
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 v.
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Atree, in support of his rule.—In *Doe d. Shaw v. Roe*, 13 Price, 260, the court of Exchequer set aside a regular interlocutory judgment (signed for want of appearance), and writ of possession executed, on an affidavit by the attorney for the landlord and tenant, that he had received instructions for entering an appearance, but had neglected to do it, owing to matters personally affecting himself, which had prevented his attending to it. In *Doe d. Ledger v. Roe*, the landlord had by his own laches precluded himself from applying to the favour of the court.

TINDAL, C. J.—The tenant is bound to deliver the declaration and notice served upon him to the landlord under whom he holds, and whom he knows. In the present case, for anything that appears, the party claiming to be let in to defend may be a devisee of the person under whom the tenants came in, or he may be the lord having the estate cast upon him by escheat. Collusion between the lessor of the plaintiff and the tenants being denied, I think we have no authority to interfere. The cases of *Doe d. Ledger v. Roe*, and *Goodtitle v. Badtittle*, are precisely in point. In *Doe d. Shaw v. Roe*, there was a mere slip on the part of the attorney, who had been duly instructed, but had neglected to enter an appearance to the action. The party here claiming to be landlord may bring another ejectment.

The rest of the court concurring—

Rule discharged, without costs.

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Wednesday,
June 17th.

HAINES v. DISNEY.

ARNOLD, on the part of the sheriff, obtained a rule under the interpleader act, 1 & 2 Will. 4, c. 58, s. 6 (a); the sum in dispute was but 12*l.* 3*s.* 3*d.*, and, this being the last day of term, he prayed that cause might be shewn at chambers.

Against a rule obtained by the sheriff under the interpleader act—Held, that cause may be shewn at chambers. *Sed quare.*

GASBLEE, J., at first doubted whether a judge at chambers could entertain such a rule: but, after consulting with the rest of the court, he said, that, although the application could not originally be made to a judge at chambers, they saw no reason why cause should not be shewn there.

Rule accordingly (b).

(a) Which—after reciting that “difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers”—enacts, that, when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application of such sheriff or other officer made before or after the re-

turn of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of court, as well the party issuing such process, as the party making such claim, and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff, or other officer, all or any of the powers and authorities therein-before contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the court.”

(b) The attention of the court was not called to the case of *Shaw v. Roberts*, 2 D. 25, where it was held that a rule under this clause of the act, granted in court, cannot be discussed at chambers; nor to the different language of ss. 1, 2, and

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Wednesday,
June 17th.

An abstract of a title to an estate sold by auction disclosed a conveyance in fee and a deed assigning terms to attend the inheritance dated in 1737 (shewing some terms outstanding, which occasioned considerable expense), and a perfect title by possession for sixty years;—Held, that the costs thus occasioned were allowable on taxation:—Held also, that the costs of attested copies of the will of the vendor's father ought not to be allowed.

Ex parte QUICK and Others.

ON the taxation of a bill of costs of making title to certain property sold by auction, the prothonotary (for the purpose of taking the opinion of the court) disallowed the costs occasioned by that part of the abstract which related to deeds and assignments of terms dated in 1737, it appearing that there was a perfect title by possession for sixty years; he also disallowed the costs of furnishing an attested copy of the will of the vendor's father.

Talfourd, Serjeant, having on a former day obtained a rule nisi to refer the bill back to the prothonotary to review his taxation in respect of the sums so disallowed—

The prothonotary delivered the following statement:—

“The following is a short abstract of a title to an estate at A.

“1737—A conveyance in fee, and a deed assigning terms to attend the inheritance. These terms, being satisfied, were never afterwards questioned or dealt with. Subsequently, the property came into the possession of Lady Chichester, who by her will, dated in 1773, devised it, and through which will the vendor held the property. Lady Chichester had possessed the property several years,

3, relating to applications other than by sheriffs or officers, which give power to a judge at chambers, subject to a proviso in s. 4, “that every order to be made in pursuance of this act by a single judge *not sitting in open court*, shall be liable to be rescinded or altered by the court in like manner as other orders made by a single judge.” If the parties called upon (under s. 6) decline to appear before a judge at

chambers, it is difficult to perceive how any order could be made. The 6th section also places the costs in the discretion of the court: could a judge at chambers exercise a discretion over the costs? particularly as it has only very lately been determined that judges at chambers can in any case give costs—*Doe d. Prescott v. Roe*, 2 M. & Scott, 119, 9 Bing. 104, 1 D. P. C. 274.

and her possession could be shewn by leases granted by her as far back as 1761.

"In 1832, the owner, wishing to dispose of this property, instructed his solicitor to prepare abstracts for the purchasers. The abstracts so prepared commenced with the deeds of 1737, shewing some outstanding terms; in consequence of which assignments were called for at considerable expense to the vendor.

"In the conditions of sale (prepared by the same solicitor) the following clause was inserted—'That the respective purchasers should be satisfied with an attested copy of the probate of the will of J. Quick, deceased (the father of the vendor), which, when required, should be furnished to them at the costs of the vendor; but, if the said respective purchasers should require an office copy of such will, such office copy should be furnished to them at his, her, or their respective expense.'"

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Ex parte
Quick.

Merewether, Serjeant, shewed cause. — It was not necessary that the abstract should go further back than the will of Lady Chichester, under which, coupled with the leases granted by her in 1761, there would be a perfectly unquestionable title: neither was there any necessity for any attested copy of J. Quick's will. As to both, therefore, the prothonotary has exercised a discreet judgment.

Talfourd, Serjeant, in support of his rule.—The vendor's solicitor having the deeds of 1737 in his possession, would hardly be justified in suppressing that part of the title. As to the second point, the only difference would be, that, if an attested copy of Quick's will had not been furnished, the whole of it must have been set out in the abstract.

TINDAL, C. J.—Sixty years' possession would shew a good title; and perhaps it might not be prudent to go

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Ex parte
Quick.

further back. But I am not prepared to draw the line too tightly. The purchaser might bring an ejectment, and be turned round for want of the means of shewing that the outstanding terms had been brought in. How can we say that the deeds of 1737 would not be called for? A single question very likely to be asked would have compelled the vendor to disclose those deeds. I therefore think the costs as to them should be allowed.—With respect to the other point—the costs of the attested copies—I think they ought not to be allowed. The clause as to them in the conditions of sale is unusual.

The rest of the court concurring, the rule was, with this modification, made—

Absolute (a).

(a) In the course of the argument it was stated that the opinions of Mr. Preston and of two other eminent conveyancers had been taken upon the question. The former learned gentleman was of opinion that the abstract properly embraced the deeds of 1737: the two latter, that the leases of 1761 and the will of Lady Chichester (1773) were sufficient.



Wednesday,
June 17th.

In the indorsement on a writ of summons, the residence of the attorney stated thus—"No. 1, Clifford's Inn Passage, Fleet Street, in the city of London," without mentioning the parish—is sufficient.

ARDEN and Another v. GARRY.

THE defendant was served with a writ of summons, indorsed—"This writ was issued in person by R. & C. Arden, who reside at No 1, Clifford's Inn Passage, Fleet Street, in the city of London."

Humfrey, on a former day, upon an affidavit stating that Clifford's Inn Passage was in the parish of St. Dunstan in the West, obtained a rule calling upon the plaintiffs to shew cause why the writ of summons should not be set aside for irregularity, on the ground that the indorsement was not in compliance with the 2 Will. 4, c.

39, & 12, and the schedule No. 1, which provides that the indorsement on every writ issued by the authority of the act shall mention "the city, town, or *parish*, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be."

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Telford, Serjeant, contra, referred to *Engleheart v. Eyre*, 2 D. 145, and *King v. Monkhouse*, 2 D. 221, where "Gray's Inn, London," and "Gray's Inn Square, London," were held sufficient descriptions of the residence of the party suing out the writ, to satisfy the statute.

Hamprey, in support of his rule.—The cases cited are wholly inapplicable: Gray's Inn is extra-parochial, and though, strictly speaking, it is not within the city of London, it is within the ambit of that which is in common parlance styled London.

TINDAL, C. J.—I think this indorsement is sufficient. The statute intended to provide for cities, towns, or parishes by themselves. To favour the construction contended for on the part of the defendant, we must read "and" for "or."

VAUGHAN, J.—I am not aware of any city that does not contain several parishes. The words of the statute are exactly complied with by giving the name of the city, or the town, or the parish.

The rest of the court concurring—

Rule discharged, with costs (a).

(a) See *Yardley v. Jones*, 4 D. 45.

1835.

Wednesday,
Nov. 25th.

That a notice of trial before the sheriff is given for a day not fixed for trying issues, is no ground for moving to set it aside.

In causes to be tried before the sheriff, the issue must be delivered as in other cases.

SAME *v.* SAME.

WILDE, Serjeant, in Michaelmas Term, obtained a rule calling upon the plaintiffs to shew cause why the notice of trial given in this cause should not be set aside for irregularity, with costs. The irregularities complained of were—that no issue (properly so called) had been delivered—and that the notice was given for a day which the sheriff before whom the cause was to be tried had not fixed for trying issues.

Talfourd, Serjeant, shewed cause.—He submitted that the last objection was not one that the party could take on motion: the proper course being to treat the notice as a nullity. [To this the court assented.] As to the first point, he contended that in causes directed to be tried by the sheriff, the issue need not be delivered in the same manner as is required in causes in the superior courts—referring to the 59th rule of Hilary Term, 2 Will. 4, which provides, that, “in all cases where the plaintiff in pleading concludes to the country, the plaintiff’s attorney may give notice of trial at the time of delivering his replication or other subsequent pleading; and, in case issue shall afterwards be joined, such notice shall be available; but, if issue be not joined on such replication or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid.”

Wilde, Serjeant, in support of his rule.—There can be no reason why the defendant in a cause to be tried before a sheriff, should not have the same information, and conveyed to him in the same form, as in the case of a trial at Nisi Prius. Great confusion and uncertainty would inevitably result from the court holding that the delivery of

the issue may be dispensed with: the mode of proceeding in these inferior jurisdictions is in general already sufficiently loose.

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TINDAL, C. J.—The non-delivery of the issue is clearly an irregularity. The defendant is entitled to have the proceedings fairly copied before him. The schedules, Nos. 4, 5, 6, 7 and 8, to the general rules of Hilary Term, 4 Will. 4, give the forms of the issue and proceedings where the cause is directed to be tried before the sheriff: and these were not intended to be a dead letter.

The rest of the court concurring—

Rule absolute, with costs (a).

(a) See the 3 & 4 Will. 4, c. 42, s. 17, 18, by the latter of which it is provided that "the sheriff, or his deputy or judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are thereafter (by s. 23) given to judges at Nisi Prius."

INNES v. LEVI.

Wednesday,
June 17th.

THIS was an action of debt against a sheriff's officer for extortion, under the statute 32 Geo. 2, c. 28, s. 1, which (amongst other things) provides, that "no sheriff, under-sheriff, bailiff, &c., shall demand, take, or receive, or cause to be demanded, taken, or received, directly or indirectly, any other or greater sum or sums of money than is or shall be by law allowed to be taken or demanded for any arresting or taking, or for detaining, or waiting till the person or persons so arrested or in custody shall have given an appearance or bail," &c. In the present case it appeared that the plaintiff was arrested within the distance of three miles from the sheriff's office; and that the fee

The only fee allowed by law to be taken by the officer from a party arrested, is 4d., the fee prescribed by the statute 23 Hen. 6, c. 9: if he take more, he is liable to be sued for the penalty imposed for extortion by the 32 Geo. 2, c. 28.

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demand and received from him was a fee of 1*l*. One of the masters of the King's Bench, who had formerly been in extensive practice as an attorney, and who was called as a witness on the part of the plaintiff, proved that, when the arrest took place within three miles of the office, the officer was entitled to a caption fee of 10*s*. 6*d*., and to 1*l*. 1*s*. when the distance exceeded three miles: and, on his cross-examination he stated that he had very many times paid 1*l*. or 1*l*. 1*s*. to the officer on behalf of a defendant, and had the same allowed on taxation. On the part of the plaintiff it was contended that the only fee by law payable *by the party arrested* to the officer, was 4*d*., the fee provided by the statute 23 Hen. 6, c. 9. Bosanquet, J., before whom the cause was tried at the last Sitting in London during the present term, told the jury that he thought the fee taken by the defendant on this occasion was larger than the law allowed. A verdict having been taken for the plaintiff for the amount of the penalty—

Bompas, Serjeant, on a former day, moved for a rule nisi to enter a nonsuit, on the ground that the fee taken was a legal fee; or for a new trial, on the ground that the verdict was against evidence.—The fee in question is totally distinct from the fee allowed as between party and party—the caption fee, which is payable in the first instance by the party who puts the sheriff in motion. This fee is given on the defendant's being admitted to bail (which was formerly a matter that rested entirely in the discretion of the sheriff), and is clearly established by law. In *Martin v. Bell*, 6 M. & Sel. 220, it was held that the table of fees prescribed by the statute 32 Geo. 2, c. 28, does not apply to the sheriff's fee for an arrest, and that the evidence of what the law allows is what upon taxation by the master it is the practice to allow. And in *Martin v. Slade*, 2 New Rep. 59, it was held, that, in an action on the same statute, for penalties, against a sheriff's officer for taking a larger

fee upon an arrest than is allowed by law, the plaintiff must prove the sum allowed by law, the statute 23 Hen. 6, c. 9, not being the rule: and that the court will not set aside a nonsuit grounded on the want of such evidence, in order to enable the plaintiff to recover the excess under the money counts, since he might have obtained redress by a summary application. [*Park, J.*, referred to *Boldero v. Mosse*, 3 T. R. 417.]

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It being suggested that the point had been brought under the consideration of the court of Exchequer in the course of the present term, in a case of *Philpott v. Selby*, the court said they would speak to one of the Barons before they granted the rule.

Cur. adv. vult.

GASELEE, J., now delivered the opinion of the court:—Upon inquiry concerning the case of *Philpott v. Selby*, we find that the court of Exchequer have sent the cause down to a new trial, not from any doubt they entertained as to the statute 23 Hen. 6, c. 9, being unrepealed in this particular, but on the ground that the declaration contained no count precisely adapted to the state of facts proved. In the case of *Drew v. Parsons*, 2 B. & A. 562, 1 Chit. R. 295, where a sheriff claimed as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law: it was held that the latter might maintain money had and received for the excess paid above the legal fee, or might set off the same in an action by the sheriff against him. Abbott, C. J., there said: "It seems to me that the sheriff was only entitled to make the charge of 4*d.* for each of these warrants. If this case be not within the 23 Hen. 6, c. 9, the sheriff would not be entitled to anything. The charge in this case may be reasonable, but it is contrary to law, and cannot therefore

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be allowed." And Holroyd, J., said: "The sheriff is not entitled to any fees except those given to him by some act of parliament: and the only act within which these warrants seem to be included is the 23 Hen. 6, c. 9. By that act, the bailiff is impowered to take only 4*d.* for each warrant. If so, unless some other act of parliament can be found to authorize a larger payment, the sheriff can make no further claim, for, no usage can prevail against the positive enactment of the legislature." In the subsequent case of *Foster v. Blakelock*, 5 B. & C. 328, 8 D. & R. 48, where it was held that the prohibition in the statute 23 Hen. 6, c. 9, against a sheriff's officer taking more than certain fees upon arrest, is confined to the fees to be taken from the party arrested, and does not extend to restrain the officer from suing for a reasonable compensation for work and labour at the hands of the party by whom he is employed, Abbott, C. J., says: "I agree in what has been said, that the sheriff can maintain no action for any fee beyond that which the statute allows him. But in this case I am of opinion that the bailiff could maintain an action against a party arrested to recover his fee of 4*d.*, not more. The prohibition in the statute 23 Hen. 6, c. 9, against the sheriff taking more than 1*s.* 8*d.*, and the bailiff 4*d.*, is confined to the taking of fees from the party arrested, or those acting for him." On the authority of these cases, we are of opinion that the rule for entering a nonsuit should not be granted.

The rule was granted on the ground of the verdict being against evidence.

Rule accordingly (a).

(a) See Scott, q. t., v. Marshall, 2 Tyr. 257, 2 C. & J. 238.

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*Thursday,
May 28th.*

SYKES and Two Others v. HAIGH.

BY an award the defendant was directed to deliver up *to the plaintiffs* on demand a certain bond. A demand was made by *one of the plaintiffs*, with the concurrence of the others. The defendant refusing to deliver it—

Where an award directs a bond to be delivered to the *plaintiffs* on demand, a demand by one will not suffice, in the absence of a power of attorney from the other.

Tomlinson, for the plaintiffs, now moved for an attachment.

PER CURIAM.—The award directing the bond to be delivered to the plaintiffs on demand, the demand ought to be so made that the defendant may know it to be the joint demand of all the plaintiffs. There should have been a power of attorney.

Tomlinson took nothing.

BEGBIE v. HAYNE.

*Wednesday,
June 10th.*

REPLEVIN. The defendant made cognizance as bailiff of Turgaut and Slack, assignees of the estate and effects of W. S. Evans, a bankrupt, for rent accruing to Evans and his assignees under a devise from Evans before the bankruptcy.

The statute Westminster 2, c. 37, which provides that "no distress shall be taken but by bailiffs sworn and known," does not apply to distresses for arrears of rent.

Plea in bar—that the defendant, by reason of anything by him in his cognizance alleged, ought not as bailiff to acknowledge the taking of the goods and chattels in the said dwelling-house in which &c., because, at the said time when &c., the defendant was not a bailiff sworn and known according to the provisions of the statute made and passed in the 13 Edw. 1, intituled "No distress shall be taken but by bailiffs known and sworn."

Demurrer and joinder.

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Bompas, Serjeant, in support of the demurrer.—The statute 13 Edw. 1, c. 37, merely prohibits the taking of a distress by any other than a bailiff sworn and known; the party so acting would be liable to punishment, but the distress is not avoided: nor does the statute apply at all to distresses taken for arrears of rent.

Stephen, Serjeant, contra.—The title of the chapter is, “No distress shall be taken but by bailiffs known and sworn:” and the words of the enacting part are—“Forasmuch also as bailiffs to whose office it belongeth to take distresses, intending to grieve their inferiors, that they may exact money of them, do send strangers to take distresses, to the intent that they might grieve their inferiors, by reason that the parties, not knowing such persons, will not suffer the distresses to be taken; provisum est that no distress shall be taken but *by bailiffs sworn and known*.” The object of the statute is obvious enough: the abuse it was intended to remedy was—persons being sent to make distresses who were not regular bailiffs, the tenants were induced to make rescous, being ignorant of the right or authority of the party distraining; and this is an abuse and an inconvenience that will arise as well in the case of a distress for arrears of rent as for anything else; and the words are very general. It will be for the plaintiff to shew, if he can, that the enactment is obsolete. The mere circumstance of a statute remaining for a period unacted upon, will not have the effect of repealing it: statutes do not become obsolete from age, but only from the provision being no longer applicable to the existing state of society—as in the case of the statutes against heresy, witchcraft, &c., before they were expressly repealed. Sir Edward Coke, in his commentary on this statute, says (2 Inst. 444): “This statute is made in affirmance of the common law, &c. This act extendeth only to a replevin, and not to an action of trespass, or any other action.”

TINDAL, C. J.—It appears to me, that the statute of Westminster 2nd does not apply, and was never intended to apply, to the case of a private distress for arrears of rent. To see the intention of the legislature in c. 37, we must read the 36th and 38th in conjunction with it. The 36th chapter recites that, “Lords of courts, and other that keep courts, and stewards, intending to grieve their inferiors, where they have no lawful mean so to do, procure other to move matters against them, and to put in surety and other pledges, or to purchase writs, and at the suit of such plaintiffs compel them to follow the county, hundred, wapentake, and other like courts, until they have made fine with them at their will:” evidently pointing at the mode of executing the process of some court. Then comes c. 37, which, after reciting, that, “Forasmuch also as bailiffs to whose office it belongeth to take distresses, intending to grieve their inferiors, that they may exact money of them, do send strangers to take distresses, to the intent that they might grieve their inferiors, by reason that the parties so distrained, not knowing such persons, will not suffer the distress to be taken”—provides “that no distress shall be taken but by bailiffs sworn and known.” What distresses are here meant? Following the natural order of the language employed, they clearly mean distresses to bring the parties into court. And the 38th recites that “sheriffs, hundredors, and bailiffs of liberties, have used to grieve those which be in subjection unto them, putting in assizes and juries men diseased and decrepit, and having continual or sudden disease, and men also that dwelled not in the country at the time of the summons, and summon also an unreasonable multitude of jurors, for to extort money from some of them for letting them go in peace, and so the assizes and juries pass many times by poor men, and the rich men abide at home by reason of their bribes:” again confining the object of the legislature to a mode of bringing parties into court. And

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this is the meaning of Sir Edward Coke, when he says (2 Inst. 445): "At the time of the making of this act, this process (districtio) lay in an action of debt (for, the capias in that case is given by the statute of 25 E. 3), so as this statute extending to an action of debt, although the latter act give a capias, yet the capias coming in lieu of the distress is within the act." This, however, is a case in which the subject is allowed to obtain his remedy without the intervention of any court—holding the thing distrained as a pledge for the payment of the rent due, or of satisfaction for the injury done. It would be strange, indeed, if the enactment in question were held to apply to distresses as between landlord and tenant, it being a common course for the party to make the distress himself, and *The Earl of Bedford's* case, Cro. Eliz. 14, deciding that the fact of the person making cognizance being bailiff, cannot be traversed, for it is not issuable.

PARK, J.—Reading cc. 36, 37, and 38, together with Coke's commentary thereon, it seems to me to be impossible to entertain a doubt.

The rest of the court concurring—

Judgment for the plaintiff (a).

(a) In confirmation of the judgment, *Stephen* referred to the Mirror, p. 367. He afterwards asked leave to amend: but the court refused to grant it.

1835.

Friday,
June 12th.

BOWDIDGE v. SLANEY.

THE plaintiff having been arrested at the suit of one Richmond, the defendant became one of his bail. Shortly afterwards the defendant called upon the plaintiff at Cheltenham, and, representing to him that he had obtained a judge's order to render him, and threatening to render him, induced the plaintiff to give him 44*l.* 10*s.*, the amount of the debt and costs in the action, upon the defendant's promise to remit the same to London for the purpose of settling the action. The defendant failing so to apply the money, the cause proceeded, and the plaintiff was ultimately compelled to pay the debt and costs himself; the increased costs occasioned by the defendant's default amounting to 14*l.* 7*s.* 4*d.* The defendant having subsequently repaid to the plaintiff a part of the sum so obtained from him, brought the present action to recover the balance and also damages for the breach of the defendant's undertaking. The writ was served on the 11th April, indorsed, pursuant to rule II of Hilary Term, 2 Will. 4 (a), "The plaintiff claims 8*l.* 10*s.* for debt, and 2*l.* 2*s.* for costs, and, if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed." On the 4th May, a declaration was filed, containing a special count founded on the defendant's omission to apply the money received by him according to his undertaking, the common money counts,

To entitle a defendant to a stay of proceedings on payment of the debt and costs indorsed on the writ, under reg. II of Hilary Term, 2 Will. 4, such payment must be made within the four days limited by the rule.

(a) By which it is ordered, "that, upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service,

and attendance to receive debt and costs; and that, upon payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed." See Ryley v. Boissomas, 1 D. 383, Curwin v. Moseley, 1 D. 432, Tomkins v. Chelcote, 2 D. 187.

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and a count upon an account stated. On the 18th, a judge's order was obtained for ten days' time to plead; and on the 22nd, an order was made by Park, J., that, upon payment of 8*l.* 10*s.*, the sum indorsed upon the writ of summons, with costs, all further proceedings in the cause should be stayed. It was further provided that the order should not be acted on until the 29th May, to give either party an opportunity to apply to the court.

Channell, on a former day, obtained a rule nisi to rescind the above order.—He submitted that, the four days having elapsed, the defendant had no longer any option to avail himself of the indorsement; and that the declaration having been filed, including a demand for unliquidated damages, if the proceedings were now stayed, the plaintiff would be for ever precluded from pursuing his remedy against the defendant for such damages.

J. Bayley now shewed cause.—Staying the proceedings in the action on the terms of the order, will not prejudice the plaintiff's right to bring another action for any damages he may have sustained—*Seddon v. Tutop*, 6 T. R. 607, *Young v. Munby*, 4 M. & Sel. 183, *Lord Bagot v. Williams*, 3 B. & C. 235, 5 D. & R. 87. This is in effect no more than an application on the part of the plaintiff to amend the indorsement on the writ of summons, which the court will not allow—*Trotter v. Bass*, 1 Scott, 403, 1 New Cases, 516, 3 D. 407 (*b*).

(*b*) See *Edge v. Shaw*, 2 C. M. & R. 415. There, an order was obtained for a trial before the sheriff under the 3 & 4 Will. 4, c. 42, ss. 17—20. The bill of particulars claimed 16*l.* 10*s.* 8*d.* The writ of summons when produced in evidence, appeared to be indorsed for

58*l.* After verdict for the defendant, the court, in directing a new trial on the ground of misdirection, gave the plaintiff leave to amend the writ of summons by reducing the indorsement to 16*l.* 10*s.* 8*d.* without applying to a judge. *Trotter v. Bass* was not cited.

Channell, in support of the rule.—Before the rule in question, where a plaintiff sued out bailable process, his right of recovery was not limited to the sum indorsed on the writ; and there is no reason why the rule should have that effect where the terms of the indorsement, which is conditional, have not been complied with by the defendant.

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TINDAL, C. J.—As the plaintiff goes for unliquidated damages, there should have been no indorsement of a money demand on the writ, which was rather calculated to mislead the defendant. The only question, however, is, whether the defendant can now, after the four days have been suffered to elapse, have the proceedings stayed on payment of the sum indorsed, with costs. I think he cannot.

The rest of the court concurring—

Rule absolute—the costs to be
costs in the cause.



ROSE and Another, Assignees of H. J. SAVORY, an Insolvent Debtor, v. MOSES SAVORY and Another.

Friday,
June 12th.

THIS was an action of assumpsit brought by the assignees of the estate and effects of one Henry John Savory, an insolvent debtor, to recover a sum of 622*l.* 3*s.* 10½*d.*, alleged to be due to the plaintiffs as assignees upon an account stated with the defendants, the executors of the will of the insolvent's late father, Henry Savory. The cause was tried before Lord Denman, C. J., at the last Assizes for the county of Surrey.

In an action against executors (upon an account stated) for a legacy, it is competent to the plaintiff to impeach any particular item or items on the credit side of the account.

The declaration stated that one Henry Savory bequeathed certain property to the defendants as his executors, to

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be by them divided into four shares, one of which was to belong to H. J. Savory, the insolvent; that Henry Savory, the testator, died in February, 1831; that the defendants took upon themselves the execution of the will; and assented to the bequest to the insolvent; that, after the insolvent had filed the petition to the court for the relief of insolvent debtors for his discharge from imprisonment, and after the plaintiffs had become his assignees, the defendants, as such executors as aforesaid, in December, 1834, rendered an account to the plaintiffs as such assignees as aforesaid, and then assented and agreed that the plaintiffs as such assignees as aforesaid were entitled to 622*l.* 3*s.* 10½*d.* as one fourth share of the property bequeathed by Henry Savory; and thereupon, in consideration of the premises, and that the plaintiffs as such assignees as aforesaid, at the request of the defendants, would permit them to retain the last-mentioned sum, the defendants promised the plaintiffs as such assignees as aforesaid to pay them the same on request. Breach—non-payment.

The defendants pleaded that the defendant Moses Savory, before H. J. Savory became insolvent, advanced him 400*l.* pursuant to an agreement between them, upon the security of a deed by which H. J. Savory assigned to the defendants all his the said H. J. Savory's fourth share in the property bequeathed by the testator; and that the money so advanced, together with 55*l.* for interest, remained due and unpaid.

The plaintiffs—after setting out on oyer the deed of assignment, which purported to have been made, on the proposal of H. J. Savory, on the 2nd January, 1832—replied that H. J. Savory, at the time of the execution of the deed, was in insolvent circumstances, and executed it voluntarily, with the intention of petitioning the insolvent debtor's court for his discharge.

The defendants, in their rejoinder, took issue upon this allegation.

At the trial, the plaintiffs produced in evidence the following account rendered to them by the defendants, in the handwriting of Moses Savory :—

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* Drs. The executors of the late H. Savory, in account with the estate of the deceased

	£	s	d.				
" Balance of assets	2488	15	5				
" H. J. Savory one fourth of balance	622	3	10½	Amount of assignment ..	400	0	0
				2½ years' interest due on			
				ditto	55	0	0
				Balance....	167	3	10½
	622	3	10½		622	3	10½
" Balance due to the assignees	167	3	10½				

It appeared from the evidence that the insolvent was in embarrassed circumstances at the time the advance of the 400*l.* was made to him by Moses Savory; that, on the 2nd January, 1832, when he executed the assignment, he contemplated taking the benefit of the insolvent debtors' act; and that he went to prison in November, 1833.

On the part of the plaintiffs, it was submitted, that, the assignment to Moses Savory being illegal and void, as having been made voluntarily and in contemplation of insolvency, and being also a debt due to one of the defendants only, and therefore not the subject of a set-off against a joint demand due from both, that item must be withdrawn from the account, and consequently the plaintiffs were entitled to a verdict for the full fourth share. On the other hand, it was contended, that there was no such statement of account by the defendants with the assignees, and promise by them as executors to hold the balance to the use of the plaintiffs, as to enable the latter to sue at law; and that, at all events, the account, if taken at all, must be taken entirely, and then the acknowledgment would only extend to the balance of 167*l.* 3*s.* 10½*d.* *Deeks v.*

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Strutt, 5 T. R. 690, *Jones v. Tanner*, 7 B. & C. 542, 1 M. & R. 420, and *Gregory v. Harman*, 1 M. & P. 209, 3 C. & P. 205, were cited.

The jury found that H. J. Savory was in a state of insolvency at the time of the advance made to him by Moses, but did not then contemplate taking the benefit of the insolvent debtors' act; and that the assignment of the 2nd January, 1832, was voluntary, and made with a view of petitioning the insolvent court for his discharge. A verdict was thereupon taken for the plaintiffs for 622*l.* 3*s.* 10½*d.*, leave being reserved to the defendants to move that a nonsuit might be entered if the court should be of opinion that the action was not maintainable; or that the damages might be reduced to 167*l.* 3*s.* 10½*d.*, if the court should think the plaintiffs entitled to recover to that extent only.

Channell, in Easter Term, moved for a rule nisi accordingly, or for a new trial.—He cited *Randle v. Blackburn*, 5 Taunt. 245, where it was held that the whole of the account which a party gives of a transaction must be taken together, and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his contemporaneous assertion of a fact favorable to himself: and that not merely as evidence that he made such a counter claim, but as admissible evidence of the existence of the matter in his discharge which he asserts.

The rule was granted only as to the reduction of damages.

Platt, Comyn, and *S. B. Harrison*, shewed cause.—The jury found that the assignment was voluntary and made in fraud of the rest of the insolvent's creditors. It was therefore void, and could legally form no item in the account. Taking therefore the whole account with this explanation, it shews that the entire sum claimed is due by the estate. The 455*l.* never could become the subject

of a set-off in this action: if due at all, it was due to one of the defendants only. The account is *prima facie*, not conclusive, evidence, and is open to explanation or correction. In *Randle v. Blackburn*, no explanation or correction was offered.

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Channell, in support of the rule.—The security, it must be admitted, cannot stand: but the debt itself is not tainted. A debt therefore being legally due, and an account stated in which that debt is included, the plaintiffs cannot take the account in part and reject the remainder. The defendants have stated no account with the assignees save an account embracing this deduction. In *Randle v. Blackburn*, the account stated was the evidence only; here it is the foundation of the action.

TINDAL, C. J.—It appears to me that this rule ought to be discharged. The action is brought against the defendants as executors to recover the full amount of a legacy bequeathed to the insolvent and alleged to be remaining in the hands of the defendants. It is true the action would not be maintainable unless on an account stated under the hands of the defendants. Such an account was put in by the plaintiffs at the trial. On one side of this account the executors debit themselves with 622*l.* 3*s.* 10½*d.*, one fourth share of the legacy: on the other side appears a claim of 400*l.* alleged to be due from the insolvent under a deed of assignment, and 55*l.* for interest thereon; and the defendants debit themselves with 167*l.* 3*s.* 10½*d.* as the “balance due to the assignees.” The only question is, whether the plaintiffs are so entirely and conclusively bound by this account that they must give credit for the 455*l.* I know of no rule of law which precludes a party from disputing, accounting for, or explaining any particular items of an account stated: and I do not see that the principle is at all altered by the cir-

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cumstance of the credit side consisting of a single item only. The evidence shewed that the assignment was one that could not be supported in point of law—it having been given by the insolvent as a security for a loan of money advanced to him by one of the defendants to help to keep up his credit when he was in failing circumstances, and given, as the jury have found, voluntarily, and at a time when the insolvent contemplated petitioning the insolvent debtors' court for his discharge under the act. It was therefore void by the 7 Geo. 4, c. 57, s. 32. There is a precise issue tendered by the defendants in their plea as to the assignment, which is met by the replication: and upon the issue thus raised the jury have found in favour of the plaintiffs. The plaintiffs are entitled to recover the whole of that which the executors held for the use of the insolvent: and the defendants cannot be permitted to set up a claim for a debt due to one of them. No fraud, however, is imputed to Moses Savory.

PARK, J.—The case is decided by the finding of the jury that the assignment was voluntary and made with a view to a petition to the insolvent debtors' court. It is true the action depends upon the account; but that account is not so conclusive that it is not open to the other side to shew that a particular item or items of it cannot legally be enforced.

GASELER, J.—I entertained some doubt at first, inasmuch as the plaintiffs could not recover at all without producing the account. But, on further consideration, I agree with the rest of the court in holding that the verdict ought not to be reduced.

VAUGHAN, J.—This being an action against the defendants as executors to recover the amount of a legacy, it could only be maintained by proof of an account stated: and the question is, whether such account is conclusive, or

whether it is not subject to explanation and correction. I think that, the item on the credit side failing by reason of its illegality, the defendants are not entitled to the deduction.

Rule discharged.

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FOWNES v. STOKES.

Saturday,
June 13th.

ADDISON, on the 4th instant, obtained a rule nisi for the discharge of the defendant out of the custody of the sheriff of Staffordshire, on the following grounds—1. that the defendant was arrested at the plaintiff's suit at Enville in the county of Stafford, and carried by the officer against his consent to Dudley in Worcestershire, a distance of nine miles, detained there from the 12th to the 15th May, carried thence by the same officer to Wolverhampton, and there delivered into the custody of a constable who conveyed him to Stafford Gaol—2. that the bailiff to whom the warrant was directed was not assisting in the arrest (a)—3. that the amount of the debt was not indorsed on the copy of the process served on the defendant, pursuant to rule II of Hilary Term, 2 Will. 4, the indorsement being "the plaintiff claims 200*l.* with interest from 10th November, 1833, at the rate of 4*l.* per cent. per annum, to the time of payment" (b)—4. that the affidavit of debt was defective, the action being on a bill of exchange, and the affidavit omitting to mention the amount of the bill, but merely stating a certain sum to be due for principal and interest (c).

The defendant was arrested on the 12th May, carried to gaol on the 15th, and a declaration delivered on the 28th:—Held, that an application on the 4th June to discharge him out of custody, on the ground that he had been carried out of the county and there detained two days before he was taken to the county gaol, was too late.

Quære whether this would be any ground for discharging the defendant, even had the application been made in time.

(a) See *Blatch v. Archer*, Cowp. 65, *Adams v. Osbaldeston*, 3 B. & Ad. 489. This objection was answered by the affidavits contra.

(b) See *Riley v. Boissomas*, 1 D. 383, *Curwin v. Moseley*, 1 D. 432,

Tomkins v. Chelcote, 2 D. 187, *Coppelo v. Brown*, 3 D. 166, *Sealy v. Hearne*, 3 D. 196.

(c) The affidavit stated that the defendant was indebted to the plaintiff in the sum of 211*l.* and upwards

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Talfourd, Serjeant, now shewed cause.—It appeared from the affidavits that the arrest took place on the 12th May; that the defendant was carried to gaol on the 15th; that a declaration was delivered on the 28th; and that, although his attorney was aware of the supposed irregularity on the 14th May, the rule nisi for the defendant's discharge was not moved for until the 4th June—a lapse of twenty-one days. This, it was contended, was such an unreasonable delay as to deprive the defendant of all right to complain of an irregularity. *Firley v. Rallett*, 2 D. 708, was cited. There the arrest was on the 22nd May, and an application on the 4th June for the defendant's discharge, on the ground of a defect in the affidavit to hold to bail, was held too late.

Addison, in support of his rule.—If this were a mere irregularity, the application would probably be too late. The party having been arrested in Staffordshire and carried into Worcestershire, the detention and imprisonment in the latter county were altogether illegal; it was a voluntary escape, after which the officer could not again take the defendant—Bro. Abr. *Escape*, pl. 11, *Boylton's case*, 3 Rep. 43, *Boothman v. Surrey*, 2 T. R. 5, *Chace v. Joyce*, 4 M. & Sel. 412, *Hammond v. Taylor*, 2 B. & Ald. 408. [*Tindal*, C. J.—That may be very good ground for an action against the sheriff for false imprisonment: but, is it a ground for discharging the defendant out of custody on

upon and by virtue of a promissory note dated the 10th May, 1824, drawn by the defendant, payable to the plaintiff on demand, with lawful interest for the same; that the defendant had duly paid interest after the rate of 4l. per cent. per annum upon the said principal sum of 200l. up to and inclusive of the 10th November, 1833; and that the

whole of the said principal sum of 200l., with interest thereon after the rate aforesaid, from the said 10th November, 1833, had been demanded, and remained due and unpaid.—As to the sufficiency of this affidavit, see *Cameron v. Smith*, 2 B. & Ald. 307, *Brook v. Coleman*, 2 D. 7, *Westmacott v. Cook*, 2 D. 519.

a summary application?] *Barratt v. Price*, 2 M. & Scott, 634, 9 Bing. 566, 1 D. 725, is an authority to shew that, the original caption being wrongful, the subsequent detention is equally illegal.

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TINDAL, C. J.—I think we ought not to interfere in this case. The only tangible ground for the motion is, that the defendant was arrested in one county and carried into and detained in custody for two days in another. This, it is said, is a voluntary escape. If so, the sheriff may be liable to an action: but I think it is not a ground for discharging the defendant out of custody on motion; particularly as there has been so unreasonable a delay in coming to the court. In *Barratt v. Price*, the arrest was effected fraudulently and illegally; the complaint was not, as here, of an irregularity in the mode of conducting the defendant to gaol.

The rest of the court concurring—

Rule discharged, without costs.

IRELAND v. BIRCHAM, Gent., One &c.

Friday,
June 5th.

BY indenture made the 29th August, 1815, between E. Stone and P. Stone of the one part, and J. Harris of the

The defendant and one H., by indenture dated June, 1826, demised and con-

firmed to the plaintiff the residue of a term of thirty years created by an indenture of August, 1815, to commence on the expiration of a lease for twenty-one years granted by H. in November, 1815, viz. at Christmas, 1836. H. having failed in payment of rent to the lessors pursuant to his covenant in the lease of August, 1815, an ejectment was, in 1825, brought by the lessors, wherein they obtained a judgment under which the plaintiff (who was in possession under the lease of November, 1815) was evicted. In the lease of 1826, the defendant and H. covenanted severally, and not the one for the other of them, that the plaintiff, *paying the rent reserved and performing the covenants*, should, *during the term* thereby demised, quietly enjoy the premises, without any let or disturbance of, by, or from the defendant and H. or either of them, &c., or of any person or persons claiming or to claim by, from, or under them, or any of them:—Held, that no action could be maintained for a breach of his covenant until the term thereby granted should actually come into existence.

Quære, whether, under this covenant, the defendant would be responsible for the default of H.: or whether the disturbance was by parties claiming by, from, or under the defendant and H., or either of them, within the meaning of the covenant.

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other part, the said E. Stone and P. Stone, for the consideration therein mentioned, demised to Harris a messuage called the Castle alehouse, and also six other messuages adjoining, with the appurtenances, for the term of thirty years from the 25th December then next ensuing, at the yearly rent of 70*l.*, payable quarterly, and clear of the land-tax and all other taxes whatsoever. The indenture contained on the part of Harris (amongst others) covenants for the payment of the rent and taxes, and to insure the premises in the London Insurance Office, in the joint names of Harris and E. and P. Stone, for 1500*l.*, and to deposit the policy in the hands of the said E. and P. Stone. The deed also contained a proviso for re-entry on non-payment of rent for twenty-one days, or upon making default in performance of all or any of the covenants by Harris. E. and P. Stone on their part covenanted for quiet enjoyment upon payment of the rent and performance of the covenants. By indenture made the 22d November, 1815, between Harris of the one part, and John Jagers of the other part, the said Harris, for the considerations therein mentioned, demised the said messuage called the Castle alehouse, part of the premises demised by the said indenture of the 29th August, 1815, to Jagers for twenty-one years from the 25th December then next ensuing, at the yearly rent of 31*l.* 10*s.*, with the usual covenants for payment of rent, to repair, to insure for 500*l.*, and a proviso for re-entry upon non-payment of rent or non-performance of the covenants. The said J. Harris covenanted for quiet enjoyment. This lease was assigned to various persons, and, by indenture dated the 30th January, 1817, was ultimately assigned to the said J. Harris. The defendant contended that this term thereby became merged: but, notwithstanding, the said J. Harris, by indenture dated the 24th December, 1818, purported to assign the said supposed lease to one J. County, whose assignee afterwards, by indenture dated 11th August, 1825, purported

to assign the same to the plaintiff. By indenture bearing date the 22nd March, 1823, and made between the said J. Harris of the one part, and the defendant of the other part, the said J. Harris, for better securing the payment of the sum of 349*l.* 7*s.*, among other things, assigned, transferred, and set over unto the defendant, the said messuages and tenements demised to the said J. Harris by the indenture of the 29th August, 1815, for all the residue of the said term therein mentioned, save and except the last day of the said term. By indenture made the 14th June, 1826, between the defendant, described as the mortgagee of the premises thereby demised, with others, of the first part, the said J. Harris of the second part, and the plaintiff of the third part, in consideration of 25*l.* paid to the defendant, and of 25*l.* paid to Harris with consent of the defendant, and of the payment of the rent and performance of the covenants, the defendant, at the request and by the direction of Harris, demised and leased, and the said J. Harris did demise and lease, ratify, and confirm unto the plaintiff the said messuage called the Castle ale-house, then held by the plaintiff under the said indenture of lease of the 22nd November, 1815, to hold the said premises unto the plaintiff as from the 25th December, 1836, being the expiration of the term granted by the said existing lease, for the term of nine years, at the yearly rent of 31*l.* 10*s.*, payable to the defendant during such part of the said term as he should continue mortgagee of the premises; and after payment of the principal money and interest due upon the said mortgage, then to the said J. Harris. The deed contained covenants by the plaintiff with the defendant and Harris for payment of the rent to the defendant or Harris—to repair and yield up the premises to the defendant and Harris, or either of them, at the expiration of the term—to paint the premises once in four years—to keep open the messuage as a public-house—not to carry on certain trades without the licence of the

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defendant and Harris, or one of them—to insure in the joint names of the plaintiff and defendant and Harris, in the London Insurance Office, for 500*l.*—and to permit the defendant and Harris to view the premises; and also a proviso for re-entry on non-payment of rent and non-performance of covenants. For the defendant and Harris, or one of them, on the part of the defendant and Harris, there was the following covenant:—“ And each of them the said defendant and Harris severally, and not one for the other of them, doth hereby for himself, his executors, administrators, and assigns, covenant to and with the said plaintiff, his executors, administrators, and assigns, that he the said plaintiff, his executors, administrators, and assigns, paying the said rent of 3*l.* 10*s.* at the times and in the manner hereinbefore reserved and made payable, and observing, performing, and keeping the covenants, clauses, provisos, and agreements hereinbefore contained on his or their part to be paid, observed, and kept, shall and lawfully may, during the term hereby demised, peaceably and quietly hold, possess, and enjoy the premises hereby demised, with their appurtenances, without any let, suit, or disturbance of, from, or by the said defendant and J. Harris, or either of them, their or either of their executors, administrators, or assigns, or of any other person or persons claiming or to claim by, from, or under them or any of them.

On the 5th June, 1826, the defendant delivered to the plaintiff a notice, by which, after reciting the deed dated 22nd March, 1823, the defendant required the plaintiff, during his occupancy of the premises, to pay to the defendant the rents and profits then due, or which might become due for the premises.

In consequence of the non-payment of the rent to E. and P. Stone, by virtue of the said indenture dated the 29th August, 1815, an action of ejectment was brought in Michaelmas Term, 1825, to recover possession of the pre-

mises demised by the deed of the 29th August, 1815, and, as part of them, of the Castle alehouse, demised by the indenture of the 14th June, 1826. In that ejectment E. and P. Stone were the lessors of the plaintiff, and obtained judgment for the recovery of the possession of the Castle alehouse and the other premises demised by them to J. Harris by the indenture of the 29th August, 1815; and executed a writ of possession on the 28th September, 1827, when possession was delivered to them by the sheriff. At the time the plaintiff was in possession of the Castle alehouse, carrying on his business of a publican, which he afterwards continued to carry on therein: he was also possessed of the interest in the term demised by the indenture of the 14th June, 1826. By virtue of the writ of possession he was turned out of the house, and possession was delivered to E. and P. Stone; but the plaintiff continued to occupy the same until E. and P. Stone afterwards, by lease, demised the premises to other persons. The plaintiff then brought the present action against the defendant upon his covenant in the deed of the 14th June, 1826, that the plaintiff, paying the rent and performing and observing the covenants in that deed, should have quiet enjoyment of the premises demised during the term which was to commence in December, 1836.

The question for the opinion of the court was, whether, under the circumstances, the plaintiff could recover.

Taddy, Serjeant, for the plaintiff.—Two points are presented for discussion in this case: the one, whether this action is maintainable on the covenants contained in the indenture of the 14th June, 1826—as to which the objection on the other side is, that the habendum being for a future day (25th December, 1836), no interest passes to the lessee under it until that day shall arrive, when the lessor may be in a condition to perform his part of the contract: the other, whether the action is maintainable

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upon the covenant for quiet enjoyment, being as it is a covenant against disturbance "of, from, or by the defendant (the lessor) and Harris, or either of them, their or either of their executors, administrators, or assigns, or of any person or persons claiming or to claim *by, from, or under them or any of them*"—as to which it is objected that the disturbance complained of was a recovery by the superior landlord, and not by the defendant or Harris, or by any person claiming by, from, or under them.

1. Whether action maintainable before the period at which the term was to commence.

1. In *Ford v. Tiley*, 9 D. & R. 448, 6 B. & C. 325, A. agreed with B. to grant the latter a lease of a house as soon as he should become possessed thereof, to bear date from the 21st December, 1825, for fourteen or twenty-one years. At the date of the agreement, the house was under a lease which would not expire till Midsummer, 1827; the legal estate being in trustees, first, to pay debts, and secondly, to pay an annuity to T., and, subject thereto, to the use of A. if he attained twenty-four. In June, 1825, after A. had attained twenty-four, but before the outstanding lease had expired, he and the trustees joined in a fresh lease to C. for twenty-three years. It was held that A. was liable to an action before the expiration of the lease, which would not be out until Midsummer, 1827. Bayley, J., in delivering the judgment of the court, says: "It was objected at the trial, and the question was saved, whether the action was not premature, on the ground that the lease which was in esse at the time of the agreement, would not have expired until 1827, and was still as to these parties to be deemed as a subsisting lease: but, though we are satisfied that that lease is, as between these parties, to be considered as subsisting, and that the defendant cannot hitherto have been taken to have been possessed, and has never had a right to have the possession, we are of opinion that the action is maintainable; because, by the lease of June, 1825, the defendant has given up his right to have the possession, and has put it

out of his power, so long as the lease of June, 1825, subsists, to grant the lease he stipulated to grant. It is very true the defendant may obtain a surrender of that lease before Midsummer, 1827, and then he will be in a condition to grant the lease he stipulated to grant; but the obtaining such a surrender is not to be expected, and the authorities are, that, where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives. In 1 Roll. Abr. 248, pl. 1 (5 Vin. Abr. 224), it is said—'If a day be limited to perform a condition, if the obligor once disables himself to perform it, though he be enabled again before the day, yet the condition is broken, as, if the condition be to enfeoff another before Michaelmas; if, before the feast, he enfeoff another, though he after re-purchases, yet he cannot perform the condition:' and he cites 21 Edw. 4, 55, where Choke, who was then one of the justices of C. B., so lays it down. The same may be collected from Co. Litt. 221. b., where, upon a feoffment on condition to re-enfeoff, on payment of a certain sum by the feoffor or his heirs before a certain day, a distinction is taken between a disability in the interim on the part of the feoffor or his heirs, and a disability on the part of the feoffee, a removal of the disability before the day from the feoffor or his heirs entitling them to require a re-enfeoffment, and the removal from the feoffee being no saving to him of the consequences of a breach: and Lord Coke adopts Littleton's reason—'Maintenance, by disability of the feoffee, the condition is broken, and the feoffor may enter.' Now, if the feoffment of a stranger before the day be a breach of a condition to enfeoff J. S. at a given day, the granting of a lease to a stranger before the day will be the breach of a contract to grant a lease to J. S. at a given day, and a fortiori will it be a breach so long as the lease to such

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stranger remains in force." In the present case it appears that the Stones, in August, 1815, had demised the premises to Harris for a term of thirty years from Christmas, 1815. In November, 1815, Harris underleased for twenty-one years from Christmas, 1815, to one Jagers. In March, 1823, Harris mortgaged to the defendant, by a deed of assignment for the whole residue of the term granted to him by the lease of August, 1815, save one day: which probably would operate as an underlease. And in June, 1826, the defendant and Harris demised to the plaintiff for nine years from Christmas, 1826, which would exhaust the whole of Harris's original term; the deed containing a covenant for quiet enjoyment without let or disturbance from or by the defendant and Harris, or either of them, their or either of their executors, &c., or of any person or persons claiming or to claim by, from, or under them, or any of them. The question is, what were the relative duties of the defendant and Harris under this covenant? This is shewn by the case of *Hancock v. Caffyn*, 1 M. & Scott, 521, 8 Bing. 358. There, the defendant held premises under a lease from one J. H., at a certain rent; and entered into an agreement with one N. for the sale of all the household furniture &c. on the premises for a certain sum, to be paid by instalments—covenanting, on payment of the whole purchase-money, to demise the premises to N. for twenty-five years; the lease to contain the like covenants on the part of N. as were contained in the lease under which the defendant held. The agreement also contained a covenant that N. should, in the meantime, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted: with a power of distress for non-payment of the rent. N. was let into immediate possession under this agreement, and paid rent. The defendant neglecting to satisfy the rent due to the superior

landlord, the latter distrained and sold the goods of N. It was held that an action lay against the defendant for the breach of his implied duty to indemnify N. from the consequences of the non-performance by the defendant of his covenant with the superior landlord. *Burnett v. Lynch*, 8 D. & R. 368, 5 B. & C. 289—where it was held that case lies by the assignor against the assignee of a lease assigned by deed-poll, upon his implied duty to perform the covenants in the original lease—was the converse of that case and of the present. All covenants must be interpreted very much by the relation in which the parties stand towards each other. The undertaking on the part of the defendant here is, that the plaintiff shall be let into possession of the premises in 1836: it is true there can be no *disturbance* of possession until the possession commences; but there may be, and actually is, a destruction of the interest out of which that future possession was to arise. The fact of the eviction taking place before the plaintiff's interest commenced affords no answer to an action for a breach of the defendant's covenant. In *Campbell v. Lewis*, 3 B. & A. 392 (*Lewis v. Campbell*, 3 Moore, 35), A. demised by lease to B., who assigned his interest to C., and C. to D.: B. covenanted for quiet enjoyment with C. and his assigns: it was held that D. might maintain covenant against B., on being ejected by A. for a forfeiture made by B. before the assignment to C.

2. Where the superior landlord enters for a forfeiture, though he enters by title paramount, he enters into the estate of the lessee—2 Bl. Com. 275. Rents created by the lessee are not destroyed by the entry of the superior landlord—Co. Litt. 148. b., 233. b., 234. a. The disturbance in this case, therefore, is a disturbance by persons claiming by Harris and the defendant. If the lessee had done his duty, the Stones would have had no right of re-entry at all. It is clear, from *Burnett v. Lynch* and *Hancock v. Caffyn*, that the law would have implied a

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duty in the defendant to indemnify the plaintiff, even if there had been no express covenant: the covenant was certainly not intended to place the plaintiff in a worse condition than that in which the law would have placed him without it.

1. The disturbance not within the covenant.

Atcherley, Serjeant, for the defendant.—1. The covenant in question only applies to a disturbance by a person claiming under, that is, deriving title through, Harris and the defendant, or one of them. The disturbance of which the plaintiff complains is therefore not a disturbance within the meaning of this covenant: the Stones did not claim by or through Harris or the defendant, but by title paramount. In *Woodhouse v. Jenkins*, 2 M. & Scott, 598, 9 Bing. 431, E. S., being entitled to certain premises under a lease for ninety-nine years made to him in 1790 by a tenant for life and his eldest son, the remainder-man in tail, granted an underlease of the same premises in 1795, for sixty years, to J. A. and C. H., their executors, administrators, and assigns, with a covenant for quiet enjoyment by the lessees, their executors, administrators, and assigns, for and during the term thereby granted, “without any lawful let, suit, trouble, eviction, ejection, molestation, or interruption, of or by the said E. S., his heirs, executors, administrators, and assigns, or of or by any other person or persons whomsoever *lawfully claiming or to claim by, from, or under him, them, or any of them, or by his, their, or any of their acts, means, consent, default, privity, or procurement.*” The tenant for life and his son, the lessors in the original lease (with the nature of whose title E. S. was made acquainted, and who at the time of making the lease gave him a bond conditioned for the due observance of their covenant for quiet enjoyment), having died, the ultimate remainder-man, who was no party to the lease of 1790, entered by his title paramount, and evicted the

plaintiff, who was in possession as assignee under the lease of 1795. It was held that the plaintiff was not entitled to maintain an action of covenant against E. S. in respect of such eviction, upon his covenant for quiet enjoyment.—2. The covenant is distributive. The defendant and Harris covenant severally, each for himself, and not the one for the acts of the other. The default was by Harris, who failed in the performance of his express covenant with the Stones. *Hancock v. Caffyn* and *Burnett v. Lynch*, therefore, are wholly inapplicable. *Ford v. Tiley* is also beside the present. There, the action was brought for the breach of an agreement to grant a lease: the defendant had in the meantime granted another lease of the same premises, and so incapacitated himself from granting to the plaintiff the lease he had engaged to grant. [*Tindal*, C. J.—The plaintiff there was deprived of the benefit of the agreement: so here, the term out of which the lesser interest was to be carved, is, by the default of Harris, entirely gone]. The eviction in the present case was occasioned by a mere omission on the part of Harris: in *Ford v. Tiley*, there was an act done, viz. the granting of the intermediate lease. Besides, the default took place long before the year 1826. [*Tindal*, C. J.—The disturbance was after the grant of the lease of June, 1826. I do not think the fact of the incapacity having been created before the grant of the lease makes any difference.]. —3. The action is brought for the supposed breach of the covenant for quiet enjoyment contained in the lease of 1826. The term created by that lease has not yet come into existence; and non constat that, when the time shall arrive at which it ought to commence, the parties will not be in a situation to comply with their covenant. The actual disturbance was in the plaintiff's possession under the lease of 1815, to which the defendant was no party. No case is to be found in the books of an action being maintained for the breach of a

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covenant for quiet enjoyment, before the enjoyment under the lease has commenced. The proposition in terms involves a contradiction. [*Tindal*, C. J.—The covenant is conditional—for quiet enjoyment by the plaintiff, he paying the rent and performing the covenants reserved and contained in the lease: until the term commences he cannot be called upon to perform the condition upon which his quiet enjoyment is made to depend.]

Taddy, Serjeant, in reply.—A lessor who enters for a forfeiture does in some sense, though not strictly and entirely, come in under the lessee. All that the court decided in *Woodhouse v. Jenkins* was, that the remainderman did not claim *under* the tenant in tail. He claims *after* him, and adversely. That case, therefore, is out of the question. It is said that Harris and the defendant do not covenant the one for the other. It is true they covenant severally, and not one for the other: but they in express terms covenant for the acts of each other. The responsibility is separate: that, however, only goes to the form of the action. [*Tindal*, C. J.—Why should they covenant for two actions?] The contract is to give the plaintiff possession at all events in 1836. Suppose it had been a mere contract not under seal, could there be a doubt that it would amount to a breach for the party contracting so to deal with the subject-matter of the contract as to put it wholly out of his power to perform what he had undertaken? [*Tindal*, C. J.—How can this *conditional* covenant be said to be broken, before the commencement of the term granted by the lease?] The mere circumstance of the payment of rent being to commence at a future period, does not shew conclusively that the rest of the covenants are not to take effect immediately so far as to enable the plaintiff to maintain this action.

TINDAL, C. J.—I confess I do not feel that any answer

has been given to the remark I threw out in the course of the argument—that the covenant in question is tied up to a covenant for quiet enjoyment *during the term*. The defendant and Harris (the lessors) severally covenant with the plaintiff (the lessee), his executors, administrators, and assigns, that he, the plaintiff, his executors, administrators and assigns, *paying the said rent of 31l. 10s. at the times and in manner thereinbefore reserved and made payable, and observing, performing, and keeping the covenants, clauses, provisos, and agreements thereinbefore contained, on his and their part and behalf to be paid, observed, and kept, should and lawfully might, during the term thereby demised, peaceably and quietly hold, &c., &c.* This, it is to be observed, is only a conditional covenant; and the condition could only be performed when the lessee or his executors &c., should be in possession of the premises: it is therefore only a prospective covenant for quiet enjoyment for a term to commence on the 25th December, 1836. As the condition cannot take effect until that period shall have arrived, so neither can the obligatory part of the contract. The action has been brought too soon.

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PARK, J. concurred.

GASELEE, J.—The action in effect will be for not granting the lease when the period referred to shall arrive.

VAUGHAN, J.—I am of the same opinion. The terms of the instrument plainly import that the lease must come into existence before the covenants can be broken.

Postea to the defendant.

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It was agreed between A. and E. (the lessees of the V. Theatre) and the plaintiff, that, in consideration of 313*l.* paid by the plaintiff to A. and E., they would pay the plaintiff 360*l.* on the 31st December, 1834, if all of them and one B. F. should be living on any part of that day; that the plaintiff should till that day, if all of them, A., E., the plaintiff, and B. F., should so long live, or so long during the same period as all of them should live, have the free use of two private boxes in the V. theatre; that, if all of them, A., E., the plaintiff, and B. F., should be living on any part of the 31st December, 1834, the plaintiff should pay nothing for the use of the boxes; but, if either of them should die before that day, the plaintiff should make such compensation for the use of the two boxes during the time

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THE declaration stated that W. Abbott and D. Egerton, before and at the time of the making of the agreement thereafter mentioned, were lawfully possessed of the Victoria Theatre, and the two boxes thereof in the agreement thereafter mentioned, for an interest therein and term of years to come and unexpired, continuing thenceforth until the 31st December thereafter mentioned; and that the said Abbott and Egerton, being so possessed, on the 26th April, 1834, by a certain agreement then and there made and entered into between Abbott and Egerton of the one part, and the plaintiff of the other part, and now brought into court—after reciting that it had been agreed between Abbott and Egerton and the plaintiff, that, in consideration of 313*l.* that day paid by the plaintiff to Abbott and Egerton, they would pay to the plaintiff the sum of 360*l.* on the 31st December, 1834, if all of them and one B. Flight should be living on any part of that day; and that the plaintiff should till the said 31st December, 1834, if all of them, the said Abbott, Egerton, the plaintiff, and B. Flight, should so long live, or so long during the same period as all of them should live, have the free use and enjoyment of two private boxes in the Victoria Theatre aforesaid, one in the dress circle, and the other in the circle immediately above: and that, if all of them, the said Abbott, Egerton, the plaintiff, and B. Flight, should be living on any part of the said 31st December, 1834, the plaintiff should not pay anything for the use of the said boxes; but, if either of them should die before that day, the plaintiff should make such compensation for the use of the said boxes during the time he should have

he should have been entitled thereto, as should be just and reasonable:—Held, that this was a mere personal covenant by A. and E. with the plaintiff, and therefore not binding, as to the use of the boxes, on an assignee of the theatre.

been entitled thereto as should be just and reasonable: and also reciting that the payment of the said sum of 360*l.*, should it become payable, had been secured by the joint and several warrant of attorney of Abbott and Egerton bearing even date with the said agreement, authorizing certain attornies of the court of Common Pleas to enter up judgment against them or either of them in that court for the sum of 735*l.*, in an action of debt at the suit of one J. Marchant, with such defeazance as was thereon indorsed—Abbott and Egerton respectively agreed with the plaintiff that, thenceforth until the 31st December, 1834, if all of them the said Abbott, Egerton, the plaintiff, and B. Flight, should so long live, or so long during such period as all of them should live, he the plaintiff, and such persons as he should appoint, should have the free use and enjoyment of two private boxes in the Victoria Theatre aforesaid, one of them in the dress circle, and the other of them in the circle immediately over the dress circle, on every night that the said theatre should be open for any performance or entertainment, except only on benefit nights; and that, if all of them, the said Abbott, Egerton, the plaintiff, and B. Flight, should be living on any part of the 31st December, 1834, then the plaintiff should not pay anything for such use and enjoyment of the said boxes: but that, if either of them should die before that day, then the plaintiff, or his executors or administrators, should pay to Abbott and Egerton, or their executors or administrators, such compensation for the use and enjoyment of the said boxes during the time he should have been entitled thereto as should be just and reasonable; which compensation in the last-mentioned case he, the plaintiff, thereby agreed to make and pay accordingly: as by the said agreement (reference being thereunto had) would, amongst other things, more fully and at large appear. The declaration then proceeded to state that Abbott, Egerton, the plaintiff, and Flight, were still living; that afterwards, and

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whilst the defendant had notice of the said agreement and the terms and conditions thereof, the interest and term of years of Abbott and Egerton of and in the said theatre, and all their estate, property, claim, and demand of and in the said theatre, and the two boxes thereof, by assignment thereof, came to and vested in the defendant; and the defendant, by virtue thereof, then and there entered into and upon the said theatre and two boxes aforesaid, and became and was possessed thereof for the residue of the interest and term of Abbott and Egerton therein, and of their reversionary interest of and in the said theatre, and of and in the said boxes, granted as aforesaid; that, although the plaintiff had always from the time of the making of the said agreement hitherto performed and fulfilled, and been ready and willing to perform and fulfil, all things in the said agreement on his part and behalf to be performed and fulfilled, of which the defendant had notice; yet the defendant, well knowing the premises, but intending to injure the plaintiff in the use and enjoyment of his said boxes, afterwards, and whilst he the defendant was so possessed of the said theatre, to wit, on &c., and on divers other days and times between that day and the day of the commencement of this suit, refused to permit or allow the plaintiff and such persons as he appointed, the use and enjoyment of either of the said boxes on any nights that the said theatre was open for performance and entertainment, the same not being a benefit night; that, on divers, to wit, ten of the nights when the said theatre was open for performance and entertainment, but one of the said nights being a benefit night, the defendant wholly refused to the plaintiff the use and enjoyment of either of the said boxes; and that, on the rest of the said nights, to wit, twenty nights, when the said theatre was also open for performance and entertainment, not one of the said nights being a benefit night, the defendant wholly refused to the persons whom the plaintiff appointed the use or enjoyment of either of

the said boxes: and that the defendant on those nights respectively ejected, expelled, thrust out, and evicted the plaintiff and the persons whom the plaintiff on those nights respectively appointed; whereby the plaintiff had been greatly injured, and prevented from having the use and enjoyment of his said boxes; and thereby the defendant broke the said covenant entered into between Abbott, Egerton, and the plaintiff, as aforesaid; to the damage of the plaintiff of 1000*l*.

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The defendant (setting out on oyer the deed declared upon) pleaded, that, at the time of making the agreement, there were and thence hitherto had been more than one private box, to wit, five private boxes, in the dress circle of the Victoria Theatre; and that there were more than one private box, to wit, five private boxes, in the circle immediately over the dress circle in the said Victoria Theatre in the agreement mentioned.

The plaintiff replied, that, of the said five private boxes in the dress circle, and of the said five private boxes in the circle immediately over the dress circle, the defendant, on the nights in the declaration mentioned respectively, refused the use or enjoyment to the plaintiff and the persons whom the plaintiff appointed of two private boxes in the said theatre, one of them in the said dress circle, and the other of them in the circle immediately over the dress circle, or of either of them; and then and there wholly withheld the use and enjoyment of the said boxes, and of each of them, from the plaintiff and the said persons whom he appointed respectively, in manner and form as the plaintiff had in his declaration in that behalf alleged, contrary to the said covenant of Abbott and Egerton in the declaration mentioned.

To this replication the defendant demurred; and the plaintiff joined in demurrer.

The defendant having become a bankrupt since the demurrer was set down for argument—

The court refused, at the instance of the

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plaintiff, to allow a demurrer to be struck out of the paper, on the ground that, since it had been set down, the defendant had become bankrupt, and his assignees refused to take up the defence or to give security for costs.

Hoggins, for the plaintiff, on a former day, obtained a rule nisi to strike it out of the paper, upon an affidavit stating the fact of the defendant's bankruptcy, and that the assignees had refused either to defend or to give security for costs.

W. H. Watson shewed cause.—Although the court will not ordinarily allow judgment of nonpros. to be signed against a plaintiff who declines to proceed in the action when the defendant has become bankrupt; yet that is only where further steps are to be taken, and additional, and in all probability unavailing, expense is to be incurred by the plaintiff. Here, however, all the costs are already incurred, and the interest of a third party (the defendant's attorney) intervenes. Besides, the demand for which this action is brought would never become a debt proveable under the commission.

Hoggins, in support of his rule, urged the great hardship and injustice of compelling the plaintiff to proceed under a moral certainty of deriving no benefit whichever way the judgment might pass.

PER CURIAM.—It would be equally hard upon the defendant to permit the plaintiff now to withdraw. The plaintiff was the moving party. Not being aware of any authority for the motion, we think the rule must be discharged.

Rule discharged, without costs.

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June 10th.

W. H. Watson, in support of the demurrer, was proceeding to contend that the action was not maintainable, the covenant declared on being a mere personal covenant, and there being no privity of contract between these parties, when the court called on—

Hoggins to support his declaration.—This was at all events a beneficial licence to be exercised upon land, within the authority of *Taylor v. Waters*, 7 Taunt. 374, which is not countermandable. Though granted in the form of a licence, it in effect amounts to a lease, and may be so pleaded. In Bacon's Abridgment, *Leases* (K), it is said—"If one only license another to enjoy such a house or land till such a time, this amounts to a present and certain lease or interest for that time, and may be pleaded as such, though it may also be pleaded as a licence; and, if it be pleaded as a lease for years, and traversed, the lessee may give the licence in evidence to prove it. So, where the owner of a house and brewhouse entered into partnership, and assigned one fifth, and covenanted that the partner should reside in the house, &c., it was holden that he could not maintain an ejectment against the partner contrary to his own agreement. Besides that, as a licence to inhabit, it amounted to a lease." In *Vyvyan v. Arthur*, 2 D. & R. 670, 1 B. & C. 410, it was held that a covenant to render suit to a mill, being in the nature of a covenant to pay a rent, ran with the land. In *Jourdain v. Wilson*, 4 B. & A. 266, a covenant in a lease, by the lessor, to supply two houses with good water at a rate therein mentioned for each house, was held to be a covenant running with the land. In *Cole's* case, 1 Salk. 196, the court say—"Where the lessee agrees to let the lessor have a thing out of the demised premises, as, a way, common, or other profit appendre; in such case covenant lies for the disturbance: and this covenant goes with the tenement, and binds the assignee." (a) Suppose this had been a covenant for an annual rent, could not the assignee of the reversion have sued the lessee or licensee for such rent? If so, and he would be entitled to the benefit of such a covenant, why should he not take the onus?

(a) See *The Earl of Portmore v.* 694; *Buckeridge v. Ingham*, 2 Bann, 3 D. & R. 145, 1 B. & C. Ves. 652.

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W. H. Watson, in reply.—The agreement amounts to no more than a mere cloak for usury. There is no covenant affecting the thing demised, and no privity of contract between the plaintiff and defendant, upon which to rest this action. The argument on the other side amounts to this—that a licence to enjoy a house &c. for a given space, is a lease. Be it so: the licence in this case is not a licence to enjoy any two specific boxes; but a licence to enjoy *a* box in the dress circle, and *a* box in the upper circle. In all the cases in which a licence has been held to operate as a lease, an interest passed creating a privity of estate. Wilmot, C. J., in *Bally v. Wells*, says: "To carry the lien of a personal obligation over to an assignee, and to make him the object of an action at the suit of a person with whom he did not originally contract, he must in all cases, where something is to be done de novo, be expressly named; and there must also be a privity between the assignee and the person to whom he becomes engaged; and the covenant must respect 'the thing leased,' which I consider as the medium creating the privity between them." So, in *Webb v. Russell*, 3 T. R. 393, Lord Kenyon says: "It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties." And see Lord Holt's dictum in *Brewster v. Kidgill*, 12 Mod. 170, and Lord Ellenborough's remark thereon in *Milnes v. Branch*, 5 M. & S. 411. For a confirmation of Lord Holt's opinion, see 1 Wms. Saund. 241 *a* [g], and the cases there cited.

TINDAL, C. J.—Without entering into any such nice disquisition as that we are invited to by the cases cited, I think it enough to say that the covenant upon which this action is founded is a mere personal covenant. The transaction arises out of a loan of money, to be repaid on a given day, provided certain persons named in the agree-

ment shall be then living; the use of the two boxes in the Victoria Theatre is thrown in by way of bonus. No interest in any specific part of the theatre passes from the lessees to the plaintiff, nor even the use and enjoyment of any particular two boxes. To hold this to be a covenant running with the land, would be charging an assignee far beyond anything that is warranted by the decided cases. The plaintiff would have a good cause of action upon the agreement against Abbott and Egerton: but clearly not against the assignee. If authority be necessary, *Spencer's case*, 5 Rep. 15. b., is clearly in point. Lord Coke there says: "Although the covenant be for him and his assigns, yet, if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As, if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it no more than any other stranger." That authority would govern the principal subject matter of this covenant; and so also will it govern the collateral matter.

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PARK, J.—This was a mere personal covenant—a cloak for an usurious dealing. Whatever may be the plaintiff's remedy against Abbott and Egerton, there is no pretence for throwing the burthen upon their assignee.

GASELEE, J., concurred.

VAUGHAN, J.—This action is only maintainable in respect of privity of contract or privity of estate. Privity of

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contract here is out of the question: and, with regard to privity of estate, the agreement conveyed no interest in any specific part of the theatre; it was not a covenant in any manner running with the land.

Judgment for the defendant.

Tuesday,
 June 9th.

DRUMMOND v. PIGOU.

In an action on the case for maliciously and without reasonable or probable cause procuring the plaintiff to be outlawed, the declaration stated that the plaintiff was not in anywise subject or liable to be outlawed at the suit of the defendant; that the defendant made an affidavit of debt, whereby he deposed that the plaintiff was indebted to him in \$550l.; and that the plaintiff, upon the prosecution of the defendant, under colour and pretence of owing the said sum of \$550l., was declared an outlaw: assign-

ing for special damage, that the plaintiff was put to costs in and about reversing the outlawry. The existence of the alleged debt (the non-existence of which was the only gravamen charged in the declaration) being admitted:—Held, that there was reasonable and probable cause for proceeding to outlawry, notwithstanding the defendant was aware at the time of issuing the exigent that the plaintiff was abroad and had an agent in London:—Held also, that, under not guilty, the reversal of the outlawry was not put in issue: and *semble*, that, if it had been, the rule of court and entry thereof in the officer's book was not evidence of that fact.

tiff to be declared and adjudged an outlaw, and to impoverish and wholly ruin him; theretofore, to wit, on the 17th May, 1834, made an affidavit of debt before the filacer of the court of Common Pleas, whereby the defendant deposed that the plaintiff was then indebted to him the defendant, as the executor of one Jemima Pigou, in the sum of 3550*l.* and upwards, for principal and interest due from the plaintiff upon his the plaintiff's covenant in a certain indenture of release or mortgage: and the plaintiff further said that such proceedings were thereupon had by the defendant, to wit, on the 3rd October, 1834, that he, the plaintiff, upon the prosecution of the defendant, under colour and pretence of owing the said sum of 3550*l.*, was declared an outlaw: and the plaintiff further said that the said outlawry was afterwards, to wit, on the 26th November, 1834, *duly reversed*: and the plaintiff further said, that, by means of the proceeding to outlawry by the defendant against the plaintiff as aforesaid, and the several proceedings had thereon before the same could be reversed as aforesaid, the plaintiff was greatly injured in his credit and reputation with and amongst all his neighbours and acquaintance, and all other his majesty's subjects to whom he was in anywise known, and the plaintiff had also by means of the premises been forced and obliged to lay out and expend, and had necessarily laid out and expended, a large sum of money, to wit, the sum of 100*l.*, in and about reversing the said outlawry; and the plaintiff had been and was greatly injured, by means of the premises, in his character and circumstances.

The defendant pleaded—first, not guilty—secondly, that the plaintiff, at the time of the proceeding to outlawry, in the declaration mentioned, was subject and liable to be outlawed at the suit of the defendant: whereupon issue was joined.

The cause was tried before Tindal, C. J., at the Sittings at Westminster, after last Hilary Term. It was admitted

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that the plaintiff was indebted to the defendant, as the executor of Mrs. Pigou, in the sum of 3550*l.* for principal and interest due upon a mortgage: and it was proved that a negotiation had been for some time pending between them for the discharge of this debt by the sale to the defendant of certain fee-farm rents belonging to the plaintiff. In consequence of some misunderstanding between the solicitors of the respective parties, the intended sale was never carried into effect, although the defendant had actually been in receipt of the rents; and the defendant issued process against the plaintiff for the debt, and, notwithstanding he was aware that the plaintiff was out of the country, and that he had an attorney ready to act for him in London, caused the *ca. sa.* to be returned with extraordinary expedition, and outlawed the plaintiff. On his return to this country, the plaintiff applied to the court to set aside the outlawry, on the ground of the proceedings having been taken against him during his absence from England: and, in Michaelmas Term last, the court made absolute a rule for reversing the outlawry, on certain conditions. It did not appear whether these conditions had been complied with or not. No judgment of reversal was ever entered upon record. The rule for the reversal and the entry thereof in the officer's book, were the only evidence offered as to that fact.

On the part of the defendant it was objected, that, the existence of the debt being admitted, the ground of action failed; the allegation in the declaration being, that the defendant falsely and maliciously, and without any reasonable or probable cause, procured the plaintiff to be outlawed, under colour and pretence of owing the defendant 3550*l.*: and it was further objected that there was no proof of the reversal of the outlawry. His lordship thought the reversal of the outlawry was not put in issue by the pleadings, and therefore need not be proved at all: but, conceiving that, from the admitted fact of the debt

being due, and the plaintiff abroad, the allegation of malice and want of reasonable or probable cause for the outlawry, was negatived. The plaintiff was thereupon nonsuited.

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F. V. Lee, in Easter Term, obtained a rule nisi to set aside the nonsuit, and have a new trial.—He submitted that, under the circumstances, the plaintiff being abroad, and having a known agent in London, the causing him to be outlawed was an abuse of the process of the court, and afforded ample ground whence a jury might presume malice and the absence of reasonable or probable cause—citing *Anonymous*, 2 Vent. 46; *Radnor v. Colebatch*, 2 Salk. 495; *Hill v. Wilks*, 12 Mod. 413; *Biscoe v. Kennedy*, 2 Wils. 127; *Richardson v. Robinson*, 5 Taunt. 309, 1 Marsh. 58; *Bryan v. Wagstaff*, 8 D. & R. 208, 5 B. & C. 314, R. & M. 329, 2 C. & P. 125; *Graham v. Henry*, 1 B. & Ald. 131; *Hesse v. Wood*, 4 Taunt. 691; *James v. Jenkins*, 9 Moore, 589; *Johnson v. Driver*, 1 Dowl. 127.

Taddy and Talfourd, Serjeants, shewed cause.—The foundation of this action is malice in the defendant, and want of reasonable or probable cause for outlawing the plaintiff: and the plaintiff has by the form of his declaration confined the question to the mere existence or non-existence of a debt to warrant the process. A debt being admitted, coupled with the fact of the plaintiff's being abroad to avoid his creditors, the plaintiff was clearly out of court. The cases cited only tend to shew that an outlawry may be reversed where it appears that the party was abroad at the time of the issuing of the exigent; not that the fact of the party's being abroad, to the knowledge of his creditor, will warrant the inference that a proceeding to outlawry is therefore malicious. Where a debt is legally due, and the debtor goes abroad, having no property in this country available to the satisfaction of the

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debt, he is clearly liable to be outlawed.—If the reversal of the outlawry had been mere matter of inducement, inasmuch as it was not put in issue by a special plea, undoubtedly the defendant could not take advantage of the defective proof of that fact. But it is not mere inducement; it is a material allegation. In order to prove malice, it was incumbent on the plaintiff to shew that the proceedings touching the outlawry were at an end. In Selwyn's *Nisi Prius*, treating of the action for a malicious prosecution, it is said (8th edit., p. 1070)—“The declaration must state all the material circumstances attending the malicious prosecution, and how it was disposed of: because, until that be determined, it cannot be known whether the prosecution were malicious or not, and this absurdity might follow, that plaintiff might recover in the action, and yet be afterwards convicted on the original prosecution:” and in a note thereto—“The want of this averment is cured by verdict—*Skinner v. Gunton*, 1 Wms. Saund. 228; because it will be presumed that it has been proved at the trial—Per Denison, J., in *Panton v. Marshall*, B. R., Michaelmas, 28 Geo. 2.” If the reversal here be merely inducement, it could not be intended to have been proved after verdict, for only that is intended to have been proved which necessarily must have been proved. The general issue puts in issue whether the act were malicious and without probable cause: so long as the outlawry stands, it is conclusive evidence of probable cause. By the new rule, Hilary Term, 4 Will. 4, *Case*, IV., 1, it is provided that “in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.” In the present case, whether

the act complained of was wrongful or not, depends very much upon whether or not there has been an outlawry or a debt to warrant an outlawry. In *Brooke v. Carpenter*, 11 Moore, 59, 3 Bing. 297, in an action on the case against the defendant for maliciously lodging a detainer against the plaintiff, the declaration averred that the suit (in which the detainer was lodged) was determined by a rule of court, by which it was ordered that the plaintiff should be discharged out of custody, and the proceedings stayed: it was held that the *rule* was sufficient evidence to support the allegation. But that was expressly so held from the necessity of the case. Gaselee, J., there says: "In order to sustain an action for a malicious prosecution, the party suing must shew that the former suit is at an end: he must also state this in his declaration, as well as the means by which the suit is at an end. In the present case the suit complained of was ended by rule of court; and how can that be proved but by the production of the rule?" Here, the case is different; something further remained to be done after the rule for reversing the outlawry was obtained. In *Poynton v. Forster*, 3 Camp. 58, it was held, that, in an action for maliciously suing out a commission of bankruptcy, the allegation that the commission was duly superseded can only be sustained by the production of the writ of supersedeas, and not by the Chancellor's order directing it to issue (*a*). In *Kirk v. French*, 1 Esp. 80, a judge's order to stay proceedings in the first suit, on payment of costs, and proof of such payment, were held not to be sufficient evidence that the first suit was at an end (*b*). [*Park, J.*—That case has since been doubted. See *Bristow v. Haywood*, 1 Stark. 48, 4 Camp. 213; *Judge v. Morgan*, 13 East, 357; *Reed v. Taylor*, 4 Taunt. 616; *Brandt v. Peacocke*, 3 D. & R. 2, 1 B. & C. 649.]

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(*a*) See *Hay v. Weakley*, 5 C. & P. 361; *Whitworth v. Hall*, 2 B. & Adol. 695.

(*b*) See *Webb v. Hill*, 3 C. & P. 485, M. & M. 253.

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F. V. Lee, in support of his rule.—Outlawry is a punishment inflicted upon a party for refusing to submit to the lawful authority of the court; and formerly could only have been resorted to in cases of felony—Co. Litt. 128. b.: and in *Thornby v. Fleetwood*, 10 Mod. 357, it is said, arguendo, “it is contrary to the law that persons out of the land should be outlawed unless in some particular cases especially provided for.” Error, in fact, assigned to reverse an outlawry, that the defendant was beyond seas, is not answered by shewing that he went beyond seas to avoid the plaintiff’s process—*Hesse v. Wood*, 4 Taunt. 691. So, in *Bryan v. Wagstaff*, 8 D. & R. 208, 5 B. & C. 314, it was held, that fraudulently and covinously departing the realm before the awarding of the *exigi facias*, in order to defeat a plaintiff of the means of recovering a just debt, and to avoid outlawry, does not preclude the defendant (on error) from reversing the outlawry, if he was in fact beyond seas at the time of the *exigent*, and from thence until the time of the outlawry. [*Tindal*, C. J.—These authorities do not shew that an action on the case will lie; but merely that the outlawry may be reversed on error; or, it may be, on motion, if the debtor be abroad at the suing out of the writ of *exigent*. I think the plaintiff was bound to shew here that no debt existed to warrant the proceedings against him.] Assuming that there was an existing debt, it was not, under the circumstances, a debt for which the plaintiff ought to have been outlawed: the outlawry was reversed on motion, expressly on the ground that it was an abuse of the process of the court. [*Bosanquet*, J.—The plaintiff was bound to shew both want of probable cause and malice.] It is for the court to infer malice from the circumstances. The defendant was cognizant of the fact of the plaintiff having an agent in London, who would have appeared for him.—It is objected that the plaintiff failed in proving the allegation in his declaration that the outlawry was reversed. In the first

place, it is to be observed that the defendant has not thought fit to take issue on this fact; and therefore the plaintiff was not bound to prove it. The wrongful act complained of was the outlawry; nothing else being put in issue, the reversal is admitted on the record—*Jones v. Brown*, 1 Scott, 453, 1 New Cases, 484. But, supposing it to have been necessary to prove the reversal, the proper evidence was given, viz. the rule of court ordering the outlawry to be reversed, and a certificate of the entry thereof in the book of the proper officer. That was the best and the only evidence the plaintiff could give.

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TINDAL, C. J.—This is an action on the case, in which the declaration charges that the defendant maliciously, and without any reasonable or probable cause, caused and procured the plaintiff to be declared and adjudged an outlaw, the plaintiff, as it is alleged, not having done any act, nor being in any wise subject or liable to be outlawed at the suit of the defendant: in effect, that there was no existing debt as between the plaintiff and defendant, to justify such a proceeding; for, that is the only ground suggested to the defendant to dispute. It appeared that the defendant made an affidavit of debt, wherein he deposed that the plaintiff was indebted to him, as the executor of one Jemima Pigou, in 3550*l.* and upwards, for principal and interest due from the plaintiff upon his covenant in an indenture of mortgage. In answer to this, the plaintiff gave evidence of a negotiation having been entered into by him with the defendant for the sale to the latter of certain rents equal in value to the mortgage debt and interest; which negotiation, it appeared, in consequence of a misunderstanding between the respective solicitors, was never completed. The case therefore stands upon the simple fact of a debt of 3550*l.*, for principal and interest, clearly due from the plaintiff to the defendant. That being so, and the plaintiff having spe-

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cifically relied upon one ground for charging the defendant with malice, viz. the non-existence of a debt, which ground had failed, I thought, and still think, that the plaintiff was out of court. As, therefore, I am of opinion, upon this ground, that the plaintiff was properly nonsuited, it is unnecessary to give any opinion as to the sufficiency of the evidence offered as to the reversal of the outlawry; though, upon that point, I feel the force of the argument urged on the part of the plaintiff, viz. that that was not in issue in the cause.

PARK, J.—In order to support this action, it was necessary for the plaintiff to prove malice and the want of reasonable or probable cause for the outlawry; whether the former is established, is a question for the judge; whether the latter, for the jury: but both must concur. In the present case, it appears to have been established to the satisfaction of the judge that there was a debt due from the plaintiff to the defendant. There was an end therefore of all question of malice.—Although it is unnecessary to come to any decision on the other point, I am inclined to think Mr. Lee's argument well founded. The plaintiff should, I think, have pleaded specially that the outlawry had not been duly reversed, in order to throw upon the plaintiff the burthen of proving the reversal. The rules of Hilary Term, 4 Will. 4, contain no instance immediately applicable; but that relating to pleas to actions of slander (title *Case*, IV.) seems to approximate the nearest (c).

GASELEE, J.—I am of the same opinion. How can we

(c) "In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously and in the sense

imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged."

say that the process upon which the plaintiff was outlawed was issued without reasonable or probable cause, when it is admitted that a debt to the amount sworn to was really due to the defendant?—As to the other point—if it were necessary for the plaintiff to prove the outlawry and reversal, I am of opinion that the mere rule of court directing that the judgment of outlawry be set aside, would not be sufficient. A rule for a discontinuance is not evidence to shew that the action has been discontinued; there must be a judgment of discontinuance (*d*). So, here, the reversal of the outlawry could only have been proved by the production of an examined copy of the judgment of reversal.

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BOSANQUET, J.—I am of the same opinion. In order to sustain the action, it was incumbent on the plaintiff to shew that the proceedings to outlawry were taken without any reasonable or probable cause, and maliciously. The allegation upon which the plaintiff relied to shew the absence of reasonable or probable cause, was, that the defendant issued bailable process against him when no debt existed to warrant it. The debt being proved, the plaintiff's allegation was negatived.—As to the other point, it certainly appears to me that the wrongful act put in issue upon this record, was, the outlawry, and not the reversal, and consequently that the plaintiff was not bound to give any evidence of the latter.

Rule discharged.

(*d*) See *Fanshawe v. Heard*, 1 M. & P. 191.

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*Monday,
June 15th.*

The plaintiff, having purchased certain timber growing on the land of B., felled it, and afterwards sold it to one J. at a certain price per cubic foot, J. to be at liberty to convert the timber on the land. The trees were marked and measured by J., the number of cubic feet in each tree being ascertained, but the total contents were not summed up. Some of the trees were taken away by the purchaser:—
Held, that the transfer of the whole was complete, and consequently that the vendor had no right of lien for the unpaid price of the timber.

TANSLEY v. TURNER and Another.

THIS was an action of trespass for taking and carrying away timber and ash trees belonging to the plaintiff. The defendants pleaded—first, not guilty—secondly, that the timber and ash trees were not the timber and ash trees of the plaintiff. At the trial before Mr. Justice Park, at the last Assizes for the county of Stafford, a verdict was taken for the plaintiff, with 20*l.* damages, to be reduced to one shilling on delivery up of the timber, subject to the opinion of the court upon the following case:—

The plaintiff having purchased from a Mr. Buckley a quantity of growing timber then standing on his land at Garmelow, in Staffordshire, had it all felled; and, after it was felled, entered into a contract for the sale of a portion of the trees to one George Jenkins. Sale notes, of which the following is a copy, were signed by Tansley and Jenkins:—"1833, December 26th. Eccleshall. Bargained and sold Mr. George Jenkins all the ash at Garmelow, on lands belonging to John Buckley, Esq., at the price per foot cube—say 1*s.* 7½*d.* Payment on or before the 29th September, 1834. The above George Jenkins to have power to convert on the land. The timber is now felled. Payment to be made in cash." Six or eight of the trees were measured on the 27th of December, and taken away by Jenkins. Some time after, the whole of the remainder of the trees were marked and measured, and the length and girth of the several trees having been taken by the servants of the plaintiff and Jenkins, the cubic feet were taken, and the figures put down on paper by the plaintiff's servant. The cubic contents were not then ascertained, but the plaintiff said he would make the statement out and send it to Jenkins. This, however, he never did. Jenkins afterwards drew many trees away: he took them from all parts of the ground.

On the 15th April, Jenkins became insolvent. On that day the plaintiff told the servant of Jenkins not to remove any more of the timber till he knew who was to pay him: the servant mentioned that to Jenkins, who told him not to go on drawing the timber until he had settled with the plaintiff. Jenkins did not afterwards take any: but, on the 9th of May, a fiat in bankruptcy was issued against him, under which the defendant Turner was appointed assignee. In June, the plaintiff caused the remainder of the ash timber, which was still lying in the hedges as it had been felled, to be carried to his own saw-pits: and on the 15th of September, the defendants went and took away about two loads from the pits to a timber-yard, after notice not to take it. This was the trespass complained of by the plaintiff.

The question for the opinion of the court (who were authorised to draw such inferences from the above facts as a jury could have done) was—whether the assignee had a right to the possession of the timber. If that should be the opinion of the court, then a nonsuit was to be entered: otherwise the verdict was to stand.

Lumley, for the plaintiff.—The plaintiff is entitled to retain the verdict. The property in the timber did not pass to Jenkins by the sale. It has been decided by a very numerous class of cases that the property in goods does not pass where anything remains to be done by the vendor to complete the sale, whether for the purpose of identity, measurement, or ascertainment of the quantity or price of the article—*Hanson v. Meyer*, 6 East, 614. *Simmons v. Swift*, 5 B. & C. 857, 8 D. & R. 693, is precisely in point. There, a contract of sale was entered into in these terms—"I have this day sold the bark stacked at R., at 9*l.* 5*s.* per ton of twenty-one hundred weight, to H. S., which he agrees to take, and pay for it on the 30th of November." Part of the bark was in a few days after-

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wards weighed and delivered to the vendee, who refused to take away the remainder. It was held that the property in the residue did not vest in the vendee, the weight not having been ascertained, and consequently that neither an action for goods sold and delivered, nor for goods bargained and sold, would lie against the vendee for the amount. It is true, this case finds that the admeasurement of each tree was ascertained; but the total contents were not ascertained, and therefore the measurement was incomplete.—Admitting, however, the property in the timber to have passed by the sale to Jenkins, there was no delivery to transfer the possession from the former to the latter; and therefore the plaintiff's right of lien for the price remains. The delivery of a part has been held to operate as a constructive delivery of the whole: but that rule is confined to cases where the delivery of part is intended by the parties to enure as a complete delivery of the whole—*Simmons v. Swift*; *Bunney v. Poyntz*, 4 B. & Ad. 568, 1 N. & M. 229; *Dixon v. Yates*, 5 B. & Ad. 313, 2 N. & M. 177. In *Dixon v. Yates*, Littledale, J., lays it down as a general principle, “that so long as goods sold and unpaid for remain in the immediate possession of the vendor, he may refuse to deliver them; and, if they remain in the possession of his agent, i. e. a warehouseman or carrier, he may stop them.” In *Miles v. Gorton*, 2 C. & M. 504, goods were sold under an invoice which expressed that they remained at rent; the vendee subsequently accepted a bill drawn by the vendor for the price, which was negotiated by the vendor; whilst the bill was running, the vendee sold a part, which, by his direction, was delivered by the vendor to the sub-vendee, whom the vendor charged with warehouse rent for the part, which he paid: subsequently, the vendee became bankrupt, and the bill was dishonoured: it was held that the assignee of the vendee could not without paying the price maintain trover against the vendor for the residue of the goods which had re-

mained in his hands. And Bayley, B., said: "The general rule of law is, that, where there is a sale of goods, and nothing is specified as to delivery or payment, although every thing may have been done so as to divest the property out of the vendor, and so as to throw upon the vendee all risk attendant upon the goods, still there results to the vendor out of the original contract a right to retain the goods until payment of the price."

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Whateley, contra, was stopped by the court.

TINDAL, C. J.—It appears to me that the delivery of the timber to the purchaser was under the circumstances complete. At the time of the contract the trees were cut down, and lying on the land of Buckley; and by the terms of the contract the purchaser was to be at liberty to convert on the land. If anything remained to be done by the purchaser to complete the purchase, I admit the property would not have passed. But, when I find it stated in the case that "the trees were marked and measured; and, the length and girth of the several trees having been taken by the servants of the plaintiff (the vendor) and Jenkins (the purchaser), the cubic feet were then taken, and the figures put down on paper, by the plaintiff's servant;" it seems to me that there was a perfect measurement and ascertainment of price: the mere omission to add up the total contents is too trifling an incident to warrant us in holding that anything remained to be done for the completion of the contract. The question then is, whether or not the vendor had a right to stop the goods, the price not having been paid. He would undoubtedly have had such right had the delivery not been complete. By the terms of the bargain, the plaintiff parted with his right to go on the land of Buckley, where the trees were lying, to the purchaser; thus in effect making Buckley's land his warehouse. It further appears that the purchaser afterwards took away several of the

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trees, as he wanted them: this shews that the vendor had given him a general licence to carry them away, and that he did not intend to retain any property in them himself. Upon the whole, the case seems to me to stand clear of all the authorities that have been cited; and that the plaintiff ought to be nonsuited.

PARK, J.—I am of the same opinion. There has been a complete sale and delivery. All that was to be done on the part of the vendor was done: each tree was measured, and marked to denote the ownership of the vendee. It is said that the measurement was not completed, because the whole amount was not summed up. This is quite a new doctrine. The land being the land of a stranger, and over which the plaintiff had no control, it can only be regarded for this purpose as the vendee's warehouse.

GASKLEE, J.—I am also of opinion that the delivery in this case was complete. The only circumstance stated in the case that at all shews the plaintiff's dissent from the completion of the contract on his part, is, that he desired the purchaser's servant not to remove any more of the timber till he knew who was to pay him. But at that time it was too late.

VAUGHAN, J.—I am of the same opinion. Our decision will not at all militate against any of the authorities referred to. The general rule is, that, unless something remains to be done on the part of the vendor, the delivery is complete. In *Hanson v. Meyer*, the weighing of the starch was a condition precedent. So, in *Rugg v. Minett*, 11 East, 210, and that class of cases, something remaining to be done to complete the delivery, the property in the goods was held not to vest in the purchaser. Here, however, nothing remained to be done by either party, but for the vendee to take away a portion of the timber. Independently of

this, it is to be observed that the vendor had no interest in the land upon which the trees were lying: it is at best extremely doubtful whether he could be said to have had them in his possession.

Judgment of nonsuit.

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MARSON v. SHORT and Another.

UPON error from a county court, it appeared that the plaintiff had declared that W. Short and W. Brooke, the defendants, were indebted to the plaintiff in the sum of 60*l.* for horse meat, stabling, care, and attendance by the plaintiff before that time found, provided, and bestowed in and about the training, feeding, and keeping divers horses, mares, and geldings of and for the defendants, at their request; and in 60*l.* for the price and value of goods then and there sold and delivered by the plaintiff to the defendants at their request; and that, being so indebted, they promised to pay. The defendants pleaded that they did not promise modo et formâ: whereupon issue was joined. Upon the trial of that issue, the counsel for the plaintiff in support of the issue on his part, and to shew a joined liability of the defendant Brooke with the defendant Short, produced a certain paper writing in the words or to the effect following:—"Memorandum of agreement betwixt William Short and William Brooke, which is—the horse to be 34*l.*; William Brooke to have half at 17*l.*, and to pay half of the horse's expenses being with Job Marson, from his arriving at Malton, February 1, 1831. At the same time agreed for the horse to go to Newcastle, to be entered for the Handicap and silver cup. William Brooke, William Short. March 24, 1831."

Wednesday,
June 10*th.*

A. having purchased a horse valued at 34*l.*, it was agreed between him and B. that the latter should have half at 17*l.*:—Held, that this was an agreement for the sale of "goods, wares, or merchandizes," within the exception in the stamp act, 55 Geo. 3, c. 184, and was consequently receivable in evidence without a stamp, notwithstanding the introduction of collateral matter.

On the part of the defendants it was objected that the writing could not be received in evidence, it not being stamped according to the provisions of the statute 55 Geo.

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3, c. 184. For the plaintiff it was contended, that the writing was only produced to shew partnership between Brooke and Short; and that therefore it was receivable in evidence without a stamp. The county clerk was of opinion that the memorandum was not admissible in evidence, for want of a stamp; and the jury thereupon found a verdict for the defendants.

Cresswell, for the plaintiff.—The agreement, though unstamped, ought to have been received in evidence. It is an agreement relating to the sale of goods, wares, or merchandizes within the exemption in the stamp act 55 Geo. 3, c. 184, sched. 1, tit. *Agreement*. *Venning v. Leckie*, 13 East, 7, is in point. There, the defendant agreed in writing to take one half share of certain goods bought by the plaintiff on their joint account, half in the profit or loss, and to furnish the plaintiff with half the amount in time for the payment thereof, the goods being to be paid for by bills: and it was held that this was an agreement relating to the sale of goods within the exemption of the stamp act 44 Geo. 3, c. 98, sched. (A), and did not require a stamp.—An agreement relating to the sale of goods need not be stamped, notwithstanding it contains collateral matter, stipulations concerning the mode of payment, and the like—*Heron v. Granger*, 5 Esp. 269; *Meering v. Duke*, 2 M. & R. 121: though, if produced for any other purpose than to prove a sale of goods, it must be stamped—*Forsyth v. Jervis*, 1 Stark. 437. Here, the principal part of the agreement related to the sale of a moiety of the horse; the part relating to the animal's going to Newcastle, is merely a compact between the parties as to the mode of user.—The act imposes the duty only where the subject matter of the contract is of the value of 20*l.* or upwards. The party setting up the objection is bound to shew that the value exceeds 20*l.*—*Doe v. Avis*, Chit. Stat. 964. A memorandum given by a

carrier or wharfinger on the receipt of goods, may be given in evidence to shew the terms on which the goods were received, without a stamp, although the value of the goods exceed 20*l.*, the carriage or wharfage being of a less amount—*Latham v. Rutley*, R. & M. 13; *Chadwick v. Sills*, R. & M. 15.

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Stephen, Serjeant, contra.—It was not contended in the court below that the memorandum was admissible on the ground of its being a contract for the sale of goods and therefore exempt from duty. The plaintiff has no right to urge a new point here. [*Tindal*, C. J.—It was not necessary to state any ground in the bill of exceptions]. This is not an agreement for the sale of goods within the exemption referred to: it is a special contract for a partnership; and there is a wide distinction between a partnership in divisible and a partnership in indivisible things. Littleton, s. 314, says: "If there be two tenants in common of certain land in fee, and they give this land to a man in tail, or let it to one for term of life, rendering to them yearly a certain rent, and a pound of pepper, and a hawk or a horse, and they be seised of this service, and afterwards the whole rent is behind, and they distrain for this, and the tenant make rescous: in this case as to the rent and pound of pepper they shall have two assizes; but of the hawk or of the horse, which cannot be severed, they shall have but one assize, for a man cannot make a plaint in an assize of the moitie of a hawk, nor of the moitie of a horse, &c." Upon this Lord Coke says, 199. b.—"But, for the better understanding hereof, it is to be known, that, if two tenants in common be, and they grant a rent of 20*s.* per annum out of their land, the grantee shall have two rents of 20*s.*, for that every man's grant shall be taken most strongly against himself, and therefore they be several grants in law. But, if the two make a gift in tail, a lease for life, &c., reserving 20*s.* rent to

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them and} their heirs, they shall have but one 20*s.*, for they shall have no more than themselves reserved: and the donee or the lessee shall pay but 20*s.* according to their own express reservation: and albeit the reservation of rents severable be in joint words, yet in respect of the several reversions the law maketh thereof a severance. Now, for the rent, as namely 20*s.* or a pound of pepper may be severed, the one tenant in common may have an assize for the moiety of 20*s.* and the moitie of a pound of pepper, *de medietate unius libr' piperis*, but he cannot have an assize of 10*s.*, or *de dimidio libræ piperis*. But, for the hawk or horse, albeit they be tenants in common, they shall join in an assize, for otherwise they should be without remedie; for, one of them cannot make his plaint in assize of the moitie of a hawk or of a horse, for the law will never suffer any man to demand anything against the order of nature or reason; as before it appeareth by Littleton, s. 129: *Lex enim spectat naturæ ordinem*. Also the law will never enforce a man to demand that which he cannot recover, and a man cannot recover the moitie of a hawk, horse, or of any other entire thing: *Lex neminem cogit ad vana, seu inutilia*. But, in that case, they shall join in an assize; and the reason is, *Ne curia Domini Regis deficeret in justitiâ exhibendâ*, or, *Lex non debet deficere conquerentibus in justitiâ exhibendâ*. And if they should not join, they should have *damnum et injuriam*, and yet should have no remedy by law, which should be inconvenient; but the law will that in every case where a man is wronged and endamaged that he shall have remedy. *Aliquid conceditur ne injuria remaneret impunita quod alias non concederetur.*" In *Leigh v. Banner*, 1 Esp. 403, an agreement between merchants that one shall take a share in the outfit of a ship and the adventure, was held not to be an agreement for the sale of goods within the proviso of the statute requiring a stamp on agreements. In *Vcunning v. Leckie*, the contract clearly related to a sale of

goods; there had been a previous purchase on the joint account of the parties. *Buxton v. Bedall*, 3 East, 303, shows how rigorously this exemption in the stamp act is dealt with: there, an executory agreement for the making and putting up of machinery was held to require a stamp. So, fixtures are not goods, wares, or merchandizes within the exemption—*Wick v. Hodgson*, 12 Moore, 213; and in *Waddington v. Bristow*, 2 B. & P. 452, a written agreement for the sale of all the hops which should be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, was held to require an agreement stamp.—Then, it is said that this memorandum required no stamp for the purpose for which it was produced: and for this *Forsyth v. Jervis* was cited. That case, however, only amounts to this, that, if the agreement be offered merely to prove some collateral fact recited in it, it may be received without a stamp; though, for want of a stamp, it could not be admitted to establish the contract. This distinction is illustrated by *Rex v. Pooley*, 3 B. & P. 316, 2 Leach, 900, where it was held that a draft on an unstamped paper may be received in evidence for collateral purposes, as, to prove the offence of stealing, &c. *Wheldon v. Matthews*, 2 Chit. 399, and *Doe d. St. John v. Hore*, 2 Esp. 724, are to the same effect. Here, if the instrument was not an agreement, it would not answer the purpose for which it was offered, viz. to prove a partnership. It is further contended that it is for the party objecting to the admission of the instrument to shew that the subject matter of the contract exceeds the value of 20*l.* It may be so. But, on the face of this agreement, the subject matter appears to be of a larger value than 20*l.*: the horse is recited to be worth 34*l.*, and that was the principal subject matter.

Cresswell was heard in reply.

TINDAL, C. J.—The case of *Venning v. Leckie* appears

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to me to govern our decision. The question is whether the agreement in this case amounts to a contract for the sale of goods within the exemption of the stamp act 55 Geo. 3, c. 184, shed. part 1. The statute exempts from stamp duty any " memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandizes." It appears in this case that one of the parties had already purchased the horse, and its value was 34*l*. Then, by the terms of the agreement between Short and Brooke, the latter was to have half at 17*l*.—Short, in effect, selling to Brooke an interest in a moiety of the animal. It is contended on the part of the defendants, that this case is not to be governed by *Venning v. Leckie*, because there the contract related to an antecedent purchase on the joint account of the parties. But it seems to me that this is a much stronger case; this being a new purchase disclosed by the agreement itself. It is then said that the subject matter of the contract being indivisible, it cannot properly be said to relate to goods, wares, or merchandizes, in respect of which such a sale can take place as is contemplated by the act. I see no reason why a joint ownership should not for this purpose be considered a sale. Suppose a man having twenty tons of oil sells ten tons without an actual division, or even a present intention to divide them from the rest, would not that amount to a sale within the exempting clause? and why may there not equally be a sale of an interest or share of a horse. The sale of a moiety of the horse being the principal subject of the agreement, I am of opinion, upon the authority of the cases cited, and particularly that of *Venning v. Leckie*, that the introduction into it of collateral matter is no objection to its admissibility: and consequently there must be a venire de novo.

PARK, J.—I am of the same opinion. That the sale of a horse is within the meaning of goods, wares, and mer-

chandizes in the stamp act, there can be no doubt: and notwithstanding the agreement embraced a collateral matter, it was not the less admissible without a stamp, as was held in *Venning v. Leckie* and *Forsyth v. Jervis*. Undoubtedly fixtures, though in some sense chattels, are not goods, wares, and merchandizes within this exemption: even in common parlance they are not so styled; they have a denomination of their own, and cannot be sued for in an action for goods sold and delivered, or in trover. The same remark applies to the case of the unfinished machinery—*Buxton v. Bedall*. So, growing crops only become chattels when severed. I am clearly of opinion that the rejection of this agreement was improper.

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GASELEE, J.—I am also of opinion that this case is governed by *Venning v. Leckie*. This agreement was produced for the purpose of shewing the joint ownership of the horse. It is said this cannot be within the exception in the stamp act, because it relates to a thing in its nature indivisible. Whether the contract related to a share or interest in twenty horses or in one only, in my opinion, makes no difference.

VAUGHAN, J.—I also am clearly of opinion that this agreement is within the exception in the stamp act, and that the case is governed by *Venning v. Leckie*. The agreement is neither more nor less than a contract for the purchase by Brooke at the price of 17*l.* of an interest in a horse which at the time of the contract was the property of Short. I am not aware of any distinction between a divisible and an indivisible chattel in this respect.

Venire de novo.

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One of several part owners of a ship, without any express authority from the others, effected a joint insurance upon the entire ship, charging the premium and commission in the ship's accounts, which were open to the inspection of and were actually inspected by the other owners, and not objected to:—Held, that the jury were warranted in finding that the managing owner had a joint authority to effect an insurance for the whole; and that consequently all the owners were liable to the broker, notwithstanding the credit was in the first instance given to the managing owner alone—it appearing that the broker was ignorant of the names of the other owners.

That the judge in his summing up omits specifically to leave to the jury a point made in the course of the trial (his attention not being expressly called to it), is no ground for a motion for a new trial, if the whole case was substantially left to them.

ROBINSON and Another, Assignees of TATE, an Insolvent Debtor, *v.* GLEADOW, BLUNDELL, HOLLINGWORTH, and GLEADOW.

THIS was an action of assumpsit brought by the plaintiffs, assignees of one Tate, an insolvent debtor, to recover the amount of certain premiums of insurance, and commission for insurances effected by Tate, before he became insolvent, upon the ships *Dapper* and *Freak*, of which the defendants were joint owners. The cause was twice tried; once before Tindal, C. J., at the Sittings in London after Trinity Term, 1834, and again before Tindal, C. J., at the Sittings in London after Hilary Term, 1835. On the former occasion, a verdict was found for the defendants, and in Hilary Term, 1835, the court made absolute a rule for a new trial on the ground that the verdict was against the evidence. On the last occasion the facts were as follow (being substantially the same as those proved on the first trial):—Hollingworth (one of the defendants) was the managing owner of the ships. The insurances were effected by Tate at the request of Hollingworth on the ships generally, and the premiums and commission were debited to him alone. In the ships' accounts kept by Hollingworth, and which were proved to have been constantly open to the inspection of the other owners at Hollingworth's counting-house, and to have been actually inspected by them on several occasions, the insurance was charged as a joint insurance on behalf of all the owners, and, in the accounts delivered to them, the proportion was charged to each part-owner. There was no evidence that Tate ever knew that the Gleadows and Blundell were part owners of the *Dapper* and *Freak*; although it ap-

peared from a letter that was given in evidence that Tate was aware that Blundell was a part-owner of other vessels in which the defendants were similarly interested. It further appeared that Tate was insane, and took the benefit of the insolvent debtors' act in March, 1828; that Tate debited Hollingworth alone for the premiums and commission (which latter he in some instances divided with him,) in accounts delivered for the years 1826 and 1827; that repeated applications had been made, by Tate before his insolvency, and also by the assignees since, to Hollingworth for payment; that an action had been commenced against Hollingworth by the assignees of Tate; and that no demand had ever been made upon the other owners until after the bankruptcy of Hollingworth. On the part of the defendants it was contended—first, that it was necessary for the plaintiffs to establish a joint authority, express or implied, from the defendants to Hollingworth to pledge each of them for the whole premiums—secondly, supposing there was evidence to satisfy the jury that such authority was given, that Tate, knowing Hollingworth to be acting for himself and others, gave credit to Hollingworth alone—thirdly, that, as Tate rendered accounts to Hollingworth, charging him alone with the premiums and commission, and the defendants were by the forbearance of Tate induced to settle their accounts with Hollingworth in which these premiums were debited, the defendants were thereby discharged. His lordship left it to the jury to say, whether the insurances had been effected by Hollingworth under any joint authority from all the other part-owners; and, if so, whether the defendants were discharged by the course of dealing as between Tate and Hollingworth. The jury found for the plaintiffs.

Cresswell, in Easter Term last, obtained a rule nisi for a new trial, on the ground that the verdict was against evidence, and that the Lord Chief Justice had omitted to

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call the attention of the jury to the fact of Tate having throughout treated Hollingworth alone as his debtor.—He cited *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574; confirmed by *Thomson v. Davenport*, 9 B. & C. 82, 4 M. & R. 110; *Reed v. White*, 5 Esp. 122.

Maule and *R. V. Richards* shewed cause.—They contended that the jury were well warranted by the evidence in finding that Hollingworth had a joint authority from his co-owners to insure on their account, seeing that Hollingworth's books and accounts of the vessels in question debited them with the premiums, and they never objected, though these accounts and books were always open to their inspection, and were proved to have been actually inspected by them.

Cresswell, *Alexander*, and *Martin*, in support of the rule.—For all things requisite to the sailing of the ship, one part-owner has an implied authority to bind his co-owners: but he cannot insure for the joint account without a joint authority. Hollingworth was known to Tate as the agent of other owners whose names he did not know: he knew, however, that Blundell was an owner of the *Clarkson* and the *Angerstein*, the insurances upon which were effected by Hollingworth. Knowing that Hollingworth was a mere agent, and having the means of knowing who his principals were, and having neglected to acquire the requisite information, but elected to treat Hollingworth as his debtor, and thereby induced the other defendants to settle their accounts with Hollingworth upon the footing of his being solely liable for the premiums; it is now too late for Tate, or the plaintiffs as his assignees, to call upon the other defendants. In *Reed v. White and others*, which was an action for cordage sold, brought against the defendants as owners of the *Princess Mary*, it appeared that the defendant *White* was the managing

owner or ship's husband; and that the plaintiff took White's bill for the amount, which was dishonored, renewed, and again dishonored. For the other defendants it was insisted that the plaintiff had discharged the other owners, who, in ignorance of this mode of dealing between the plaintiff and White, had suffered him to receive large sums of the East India Company for freight, which they would otherwise have detained. Lord Ellenborough said: "If the plaintiff, dealing with White separately, has adopted him, he has discharged the others, and must have a verdict against him. If he has adjusted accounts with him on that footing, the other defendants are entitled to the benefit of it." In *Paterson v. Gandasequi* and *Addison v. Gandasequi*, it was held, that, if the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give credit to the agent, he cannot afterwards sue the principal. *Robinson v. Wilkinson*, 3 Price, 538, is an authority to the same effect. There is no case to be found where, credit having originally been given to one person, a liability has afterwards been permitted to be imposed upon others jointly with him. In *Thomson v. Davenport*, at the time of the contract, the party purchasing represented that he was buying on account of persons resident in Scotland, but did not mention their names, and the seller, without inquiring who those persons were, debited the party who made the purchase; and yet it was held that he might afterwards sue the principals for the price. Bayley, J., however, observes—"It is said, the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment."

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PARK, J.—Some things in this case are clear in matter of fact, and some in matter of law, none of which have been disputed at the bar. In the first place, though these four defendants were not general partners, it is admitted that they were all part-owners of the two ships in question, and that Hollingworth was the managing owner. But it is admitted, and is no less clear, that, though the managing owner of a ship, or, as he is called, the ship's husband, he has, in that character, no right to insure for his co-owners without an authority from them express or implied. Therefore, if one part-owner of a ship order an insurance on it without authority from the others, he cannot charge them with part of the premiums, *unless the others afterwards assent to the insurance*—*French v. Backhouse*, 5 Burr. 2727. It is true that that case turned much upon the competency of a witness, and it is equally true that that was an action brought by the ship's husband against his co-owners for their share of the general premium. But I quote it for the opinion of Lord Mansfield and some of the other judges, that, although there was no previous direction proved in that case, yet they were *informed* of it, and *acquiesced* in it; they were *told of it*, and *made no objection*. The main question here is, had Hollingworth a *joint* authority to make the insurance? I have looked carefully though the evidence, and, although I cannot discover any *previous order* to insure, the jury have found that there was a joint authority: and I am of opinion that they were well warranted in coming to that conclusion. I have examined carefully the notes of the Lord Chief Justice, with which he has favoured me; and there is most abundant evidence given by two of the witnesses, that the other part-owners, the defendants, were continually coming to Hollingworth's counting-house; that they constantly saw and inspected the accounts on paper; that the books themselves were open for their inspection: the insurance was made for their *joint account and benefit*, and they

never made any objection; therefore the case comes exactly within Lord Mansfield's doctrine, that they were fully informed of what was done, and acquiesced, never having made any objection. The maxim, "*omnis rati habitio retrotrahitur et mandato priori equiparatur*," in my mind, well applies to such a case: and, from the evidence given by the several witnesses, as it was a *joint* insurance, and which the parties had full opportunity of seeing from the books, and there was no concealment, they must have known that Hollingworth had made a joint insurance for all, and not for each man's particular share. The case of *Helme v. Smith*, 7 Bing. 709, 5 M. & P. 744, is not at all at variance with this case, for, there it was held, what no one can deny, that, if a mere part-owner of a ship lays out money for the expenses of the outfit of the ship, he may recover against the others, not being partners in the transaction itself, but merely part-owners. Lord Chief Justice Tindal, my Brother Bosanquet, and myself expressly take the distinction between the one character and the other. And even if there had been an agreement between themselves that one should be the sole paymaster, that would not vary the rights of other persons as against them all. The case of *Patterson v. Gandasequi*, 15 East, 62, was relied on by the counsel who insists that the decision of the jury in this case is wrong; but it does not militate against what the court is now about to do; for, there, a seller, knowing that he was dealing with a mere agent of another man who lived abroad, gave credit to him only, debited him, sent him the invoices made out to him and in his name, and dealing with him, and him alone; it was held that he could not afterwards turn round and charge the principal, having made his election when he had the power of choosing between the one and the other. But even that case was sent back to the jury for further information; and, though I was counsel in the cause, it being now twenty-three years ago, I really forget what became of it.

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A case, however, against the same defendant was tried in the Common Pleas about the same time, at the suit of one Addison (a), and it was not sent back, for, the court were clearly of opinion that the principal was not liable, although from both the cases it appeared that the foreign merchant, the principal, was present at the purchase and assortment of the goods, and had several meetings with the plaintiff; but the plaintiff made his election. At all events, that was a case as between the character of agent and principal; and I think the fallacy of the present argument has turned upon stating Hollingworth to be a mere agent, and that principals were discovered afterwards, although this is a case of joint authority.—I think the other question—whether, if there was this joint contract (as I think there clearly was), the manner in which Tate dealt with Hollingworth afterwards released the other co-owners—does not arise. I cannot discover any evidence from which I can draw this conclusion: it is not to be found in any of the correspondence, or in any of the parol evidence. If, as was put to the jury, there had been any fraud, or if Tate knew that there had been any settlement of accounts between them and Hollingworth, that might have raised a different question. But it has been said, it was not fully put to the jury that Hollingworth was alone debited. The Chief Justice's attention was not called to that when summing up: if it had been, his lordship says he would have said something upon it; and we all know his readiness to adopt suggestions respectfully addressed to him, as (judging of the quarter whence it would have come) I am well assured such a suggestion would in this case have been. But this is no ground for a new trial; and I am satisfied, that, if the point had been made, it could not and ought not to have had any avail. When once the *joint* authority and *joint* benefit in this insurance are established, there is an end to the question. Indeed,

(a) Addison v. Gandasequi, 4 Taunt. 574.

I am myself satisfied, that, although these four defendants were not general partners, and although one part-owner of a ship has not in that station a right to insure for the others, yet these defendants were special partners in the adventures in which these ships were engaged. I therefore think this rule must be discharged.

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GASELEE, J.—On the former occasion the court thought proper to send the cause down again because the principal point in the cause, viz. whether or not there was a joint authority given to Hollingworth to insure for all the co-owners, had been overlooked. On the second occasion the jury were satisfied of that fact. In the course of the argument it has been attempted to be shewn that Tate gave credit to Hollingworth alone, knowing at the time who the owners were. But I do not find that that is made out by the evidence. It is true that he appears to have been aware that Blundell was a part owner of some of the vessels, viz. the Clarkson and the Angerstein: but, as to the Dapper and the Freak, there was no evidence of ownership at all. Neither Tate, therefore, nor those who represent him, had any opportunity to make an election: and, considering the circumstances, I think that there cannot be said to have been any unreasonable delay. When a partnership is once made out, it requires very strong facts to absolve the liability of the parties.

VAUGHAN, J.—This is an application to the discretion of the court. If I could bring myself to think that there had been a failure of justice, notwithstanding this cause has been already twice tried, I would consent to its going down again. No additional evidence appears to have been adduced on the last occasion, though the two verdicts are conflicting. The rule was not moved for on the ground of the verdict being against evidence: but it has been attempted to be insinuated that the jury were misdirected.

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The action was brought to recover the amount of premiums of insurance upon certain ships of which the defendants were co-owners: and the real question is, whether the insurances were effected on the joint account and under the joint authority of the four defendants. On behalf of the defendants, the case has been argued on two grounds—first, on the relation of principal and agent between Hollingworth and the other defendants—secondly, on the ground that the plaintiffs had so dealt with Hollingworth as to discharge the other defendants.—With regard to the case of *Thomson v. Davenport*, the authority of which it has been attempted to impugn, I have read it with great care, and I think the general proposition there laid down is well founded. I never heard it doubted. That part of the judgment of Bayley, J., to which our attention has been more particularly directed, does not refer to the main point in the cause. This, however, is not a case of principal and agent: the defendants were, as the jury have found, joint contractors. It is true that one part-owner has not as such any implied authority to insure for all. But, from the evidence given at the trial, I think the jury were well warranted in coming to the conclusion that Hollingworth had an express authority, which was acted upon and assented to by the other defendants.—The remaining point involves something like a charge of misdirection not indeed an actual misdirection, but rather a sin of omission; for, it is said, the jury ought to have been directed to consider whether the credit had not been given to Hollingworth alone. There seems to me to be no ground whatever for this: that point was virtually involved in the former. It is absolutely impossible for a judge to call the attention of the jury expressly and explicitly to each minute subdivision of the points counsel may chuse to make in the course of a long argument: and, if possible, it would be useless and absurd. In the present case, it is true, Hollingworth appears to have been the party originally

debited. This however, is not conclusive evidence of an election on the part of Tate or the plaintiffs to take him as their debtor. There was no evidence that Tate was aware of the four defendants being joint owners of these vessels: neither can the plaintiffs, under the peculiar circumstances of this case, be held to have been guilty of laches. Upon the whole, it appears to me that the question was properly left to the jury, and that the conclusion they have arrived at was the correct one.

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TINDAL, C. J.—I have little further to say than that I fully concur with the rest of the court as to what ought to be the fate of this rule. The case has been argued throughout as one of principal and agent: but that argument falls to the ground if the jury were warranted in coming to the conclusion that the insurances were effected upon a joint contract. It has been said that I ought to have left it to the jury in terms to say whether credit was not given to Hollingworth alone. That I would very readily have put to the jury, had it been suggested to me to be necessary. But, if I had done so, I should have left it with this observation, that there was no evidence whatever to shew that Tate knew who the other owners were, unless from one of the letters produced he might have had reason to suspect that Blundell was one of them. To enable a party under such circumstances to exercise a discretion, he must know who are chargeable. When once parties are fixed as joint contractors, *Lodge v. Dicus*, 5 B. & A. 611, shews how difficult it is for them to get rid of their liability by any collateral engagement between themselves. I think there is no ground for imputing laches to the plaintiffs, and that the issue between the parties has been properly decided.

Rule discharged.

1835.

Monday,
June 10th.

In a writ of right, the tenant demurred to the count for a supposed deficiency in the statement of the descent. After argument, the court permitted him to withdraw his demurrer and plead de novo.

TWINING, Demandant, LOWNDES, Tenant.

THIS was a writ of right. The tenant demurred to the count on the ground that it did not sufficiently shew how the demandant was heir.

R. V. Richards, in support of the demurrer, cited *Dumsday v. Hughes*, 3 B. & P. 453. But the court being of opinion that it sufficiently appeared from the whole count how the demandant claimed to be heir—*Richards* prayed leave to withdraw his demurrer and plead de novo.

Taddy, Serjeant, for the demandant, submitted that amendments are now never allowed in real actions (a); and he referred to *Charwood v. Morgan*, 1 New Rep. 64, where the court refused to allow the demandant in a writ of right to amend the mistake of a christian name in the count, or to discontinue the suit, though an affidavit accounting for the mistake was produced: and to *Baylis v. Manning*, 1 New Rep. 233, where the court likewise refused to permit the count in a writ of right to be amended by introducing an additional step in the descent, though it was sworn that the mistake had arisen from the demandant having been misinformed in the country where inquiry had been made respecting the title, and that the demandant would be barred unless the amendment were allowed.

PER CURIAM.—All the cases on the subject of amendments in writs of right apply to amendments sought on the part of the demandant; and the principle upon which they have almost invariably been refused is this, that the court

(a) See the judgments of Park and Vaughan, JJ., in *Miller v. Miller*, ante, pp. 121, 122.

will afford no encouragement or assistance to one who seeks to disturb an antient possession. An amendment by the tenant stands upon a very different footing. On payment of costs, we think the tenant in this case ought to be permitted to withdraw his demurrer and plead *de novo*.

Rule accordingly.

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TWINING
Dem.
LOWNDES
Ten.

GREEN v. GLASBROOKE.

A writ of *fi. fa.* was issued in this cause, indorsed to levy 450*l.* 15*s.* Under this writ the sheriff seized property of the defendant to the value of 313*l.* 11*s.*, at which sum the landlord agreed to purchase it, the parties consenting to deduct therefrom 96*l.* 4*s.* 6*d.*, for rent and delapidations. The net proceeds, after paying the sheriff's expenses, 193*l.* 4*s.* 6*d.*, were paid over to the plaintiff's attornies. In September, 1834, the plaintiff paid his attornies all costs due to them, and obtained a judge's order requiring them to deliver up to him the judgment paper and *fi. fa.* in this cause. This order was not complied with. In September, 1835, the plaintiff's late attornies, then acting for the defendant, without apprising the under-sheriff of the fact of their being no longer attornies for the plaintiff, procured him to indorse on the *fi. fa.* that the sheriff had levied 313*l.* 11*s.*, and had accounted for the same to the plaintiff after deducting sheriff's expenses; although the undersheriff at the time suggested to them that the return should state, according to the fact, a levy of 217*l.* 6*s.* 6*d.* The plaintiff having commenced a second action to recover the balance due upon the former judgment.—

Friday,
June 12th.

The plaintiff's attornies having ceased to act for him, and become attornies for the defendant, fraudulently procured the sheriff to return on a *fi. fa.* a sum larger than that actually levied and accounted for to the plaintiff. The court (at the expense of the attornies) ordered the return to be amended according to the fact.

Talfourd, Serjeant, on a former day, obtained a rule calling upon the defendant and the attornies to shew cause why the writ of *fi. fa.* and the return thereto should

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not be taken off the file, and the entry thereof on the roll erased, or why the return should not be amended according to the fact; and why the attornies should not pay the costs.

Taddy, Serjeant, shewed cause.—If the return be false, the plaintiff has his remedy against the sheriff, which is the ordinary course. Besides, the sheriff is no party to this rule: and, without his consent or authority, the court cannot alter or amend his return.

Bompas, Serjeant, in support of the rule.—The court has beyond a doubt the power to amend its own records. The sheriff has been made the mere tool of the attornies, and they, having so misconducted themselves, ought to pay the costs of the amendment and of this motion.

PER CURIAM.—This case is entirely out of the ordinary course. We think the rule ought to be made absolute; and that the attornies who are called upon to pay the costs, have by their conduct made themselves liable thereto. They ought to have obeyed the order; after that they had no right to take any step in the cause. The return they have procured is evidently against the justice of the case. The rule therefore must be made absolute for the amendment of the return by stating the sum levied at 217*l.* 6*s.* 6*d.*, according to the fact, and the attornies must pay the costs.

Rule accordingly.

1835.

Saturday,
June 13th.

LAMBIRTH v. BARRINGTON.

IN Trinity Term, 1834, the court, by a rule made in pursuance of the interpleader act, 1 & 2 Will. 4, c. 58, directed an issue to try the validity of an assignment by Barrington to Wright and Cook in trust for Barrington's creditors, in which issue Wright and Cook were plaintiffs and Lambirth defendant. The issue was tried at the Summer Assizes for the county of Sussex, 1834, and a verdict found for the plaintiffs. On the 2nd November, 1834, a rule was obtained by the plaintiffs whereby the defendant Lambirth was ordered to pay the costs. On the 25th, Lambirth died.

The court has no power to order rules made under the interpleader act, 1 & 2 Will. 4, c. 58, to be entered in any other manner than as pointed out by the 7th section, viz. according to their true date.

Spankie, Serjeant, in Hilary Term following, obtained a rule nisi for leave to enter up the judgment nunc pro tunc—that the personal representatives of Lambirth should pay the costs of the issue—or that the rules obtained under the act should be entered of record nunc pro tunc.

Beere shewed cause (a).—1. The courts never allow parties to enter up judgments nunc pro tunc, unless the delay has arisen from the act of the court. The rule is so laid down in all the books of practice. In Tidd, 9th ed. 932, it is said: "If either party die after a special verdict or special case, and pending the time taken for argument or advising thereon, or on a motion in arrest of judgment, or for a new trial, judgment may be entered at common law after his death as of the term in which the

(a) The rule having been enlarged by consent, it was conceded that the rights of the parties must be considered the same as if the argument had taken place in Hi-

lary Term. It was also taken for granted that the rules under the interpleader act, when entered of record, would have the same effect as an ordinary judgment.

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postea was returnable or judgment would otherwise have been given, nunc pro tunc; that the delay arising from the act of the court may not turn to the prejudice of the party." In *Bates v. Lockwood*, 1 T. R. 637, where an action was brought on a judgment recovered in the King's Bench, and after judgment the defendant brought a writ of error, and obtained a rule to stay proceedings in the mean time, and the plaintiff died before judgment was affirmed, the court refused to permit judgment to be entered nunc pro tunc. There is nothing in the circumstances of the present case to induce the court to interfere: the parties had the whole of Michaelmas Term to enter the rules. A judgment entered of Hilary Term never could have relation back to the Michaelmas Term preceding; though, before the new rules, a judgment entered in the vacation after Michaelmas Term would have had relation back to the first day of that term (b).—2. As to that part of the rule which calls upon the personal representatives of Lambirth to pay the costs of the issue, the answer is, that they are not before the court.—3. The court has no power to order the rules and orders under the interpleader act to be entered as prayed. The 7th section provides "that all rules, orders, matters, and decisions to be made and done in pursuance of the act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing *the true date of such entry*, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or orders: and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the

(a) See rule 3, Hilary Term, 4 Will. 4.

taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by fi. fa. or ca. sa., adapted to the case, together with the costs of such entry, and of the execution if by fi. fa.; and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation," &c.

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Spankie, Serjeant, in support of his rule, relied on the statute 17 Car. 2, c. 8, by which it is provided, that, where either party dies between verdict and judgment, "his death shall not be alleged for error, so as the judgment be entered within two terms after the verdict."

TINDAL, C. J.—I feel some difficulty in coming to the conclusion that the court has authority to do that which is prayed by this rule; for, I find it expressly declared by the legislature that all rules, orders, &c., made in pursuance of the act may be entered of record with a note in the margin expressing the *true date of such entry*. This rule calls upon us to enter the rules now as of a day past, in direct contradiction to the act of parliament. I feel the full force of the argument urged upon the statute 17 Car. 2, c. 8. But still that is only analogy: here we have the express declaration of the legislature. One cannot but observe, too, that the difficulty is one that the parties have in some degree involved themselves in: they had from the 2nd to the 25th November to enter the rules; Lambirth being all the time alive. I give no opinion as to whether or not the suit is abated, or whether the plaintiffs are at liberty to enter the judgment as at common law. If such a proceeding were regular, the court would not interfere.

The rest of the court concurring—

Rule discharged, without costs.

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The instalments of an annuity for the payment of which a surety expressly covenants in case of the default of the grantor, are not provable under a fiat against the surety, where such instalments do not become due until after the bankruptcy of the surety.

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THIS was an action brought against the defendant as surety for one G. Smallwood, a bricklayer, to recover 280*l.*, for two years' and a half arrears of an annuity of 11*2l.* due the 30th of April, 1834, under an indenture of the 31st of October, 1831, made between G. Smallwood and the plaintiff, and 30*l.* for expenses occasioned by the principal's default of payment; and also to recover from the defendant, as such surety, the loss the plaintiff had sustained by Smallwood not completing the carcasses of certain houses, pursuant to the defendant's covenant in the said grant of annuity, on or before the 24th of June, 1832. The defendant pleaded—first, as to so much of the declaration as related to the non-payment of the 280*l.*, that, on the 8th of December, 1831, he became a bankrupt, and that the cause of action accrued to the plaintiff before he became bankrupt—a similar plea as to the 30*l.* expenses—and, as to the alleged non-completion of the houses, that they were completed. On these pleas issues were joined; and the jury found by a special verdict, that, before the commencement of the suit, to wit, on the 8th December, 1831, the defendant became a bankrupt, and that thereupon a certain commission of bankrupt, bearing date at Westminster the 8th December, 1831, was, after the making of the indenture in the declaration mentioned, duly awarded and issued against the defendant; that, by virtue of the said commission, the defendant was duly found and adjudged to be a bankrupt, and that the defendant afterwards and before the commencement of the suit, to wit, on the 3rd April, 1833, duly obtained his certificate; that 140*l.*, part of the said sum of 280*l.* of the said annuity, yearly rent-charge, or annual sum, became and was due and owing and in arrear to the plaintiff before the said 3rd of April, 1833, and the sum of 140*l.*, residue of the said sum of

280*l.* of the said annuity, yearly rent-charge, or annual sum, became and was due and owing and in arrear to the plaintiff since the said 3rd of April, 1833: and if upon the whole matter aforesaid it should seem to the court that the said certificate was not a bar to the action, then the jurors said that the causes of action in respect of the first breach in the declaration assigned did not, nor did any of them, or any part thereof, accrue to the plaintiff before the defendant became a bankrupt within the true intent and meaning of the statute then in force concerning bankrupts; and in that case they assessed the damages of the plaintiff by reason thereof, over and above the costs and charges by him about his suit in that behalf expended, to 280*l.*: that the cause of action in respect of the breach of covenant in the said declaration lastly assigned also accrued to the plaintiff before the said 3rd April, 1833: and if upon the whole matter aforesaid it should seem to the court that the said certificate was not such bar as last aforesaid, then the jurors said that the said cause of action in respect of the said breach of covenant in the declaration lastly assigned, did not, nor did any part thereof, accrue to the plaintiff before the defendant became a bankrupt as aforesaid; and in that case they assessed the damages of the plaintiff by reason thereof, over and above his costs and charges by him about his suit in that behalf expended, to 1220*l.*, and for those costs and charges, to 40*s.*

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Adams, Serjeant, for the plaintiff.—The breaches of covenant assigned in this declaration are none of them debts or demands capable of proof under the fiat against the defendant, and consequently the certificate is no bar to the action. The 54th section (a) of the 6 Geo. 4,

(a) Which enacts "That any annuity creditor of any bankrupt, by whatever assurance the same may be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value

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c. 16, relates to proof by the annuity creditor where the grantor becomes bankrupt; and the 55th (b) relates to the rights of the surety on the bankruptcy of the principal annuity debtor: neither of these clauses therefore can apply to the present case, for, it is the surety who has become bankrupt, and not Smallwood, the grantor of the annuity. The demand arising out of the first breach of covenant, if provable at all, can only be so under the 56th section, which enacts, "that, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon

the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by lapse of time since the grant thereof to the date of the commission."

(b) Which enacts that it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity, and for the payment thereof; and if such surety after such proof pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due) pay the sum so proved as

aforesaid, he may be *said* [sued] for the accruing payments of such annuity, until such annuitant shall have [been] paid or satisfied the amount so proved, with interest thereon at the rate of 4l. per cent. per annum from the time of notice of such proof, and of the amount thereof, being given to such surety; and after such payment or satisfaction, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid to the amount so paid or satisfied as aforesaid by such surety; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety in respect of such annuity: provided that such surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid."

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such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends: provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed." To bring it within that enactment there must be a *debt*. An undertaking to pay a sum on the default of a third person is not a debt. If Smallwood had been bankrupt, the annuity must have been valued: but the contingency of Smallwood's default is not susceptible of valuation. In *St. Martin (Overseers) v. Warren*, 1 B. & A. 491, 2 Stark. 188, it was held that a defendant's liability as surety in a bastardy bond is not discharged by his bankruptcy and certificate. And in *Taylor v. Young*, 3 B. & A. 521 (c), where one of two assignees of a lease gave a bond to the lessee, by whom the assignment was made, conditioned for the payment of the rent to the lessor, and the performance of the other covenants in the lease, and for indemnifying the lessee against the non-performance of the covenants, both the assignees of the lease having become bankrupt, and the bond having been forfeited before the bankruptcy: it was held that the lessee could not prove for the damages which had accrued previously to the bankruptcy, not having paid them to the lessor. So, in *Atwood v. Partridge*, 12 Mo. 431, 4 Bing, 209, where the defendant covenanted with the plaintiffs for the due payment by R. of the annual premium on a policy effected on the life of R., and given by R. to the plaintiffs by way of security for a debt

(c) *Young v. Taylor*, 8 Taunt. 315, 2 Moore, 236.

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due from him to them; and the defendant became bankrupt *before* and obtained his certificate *after* a default by R.: it was held that the defendant was not discharged from liability for the premium which the plaintiffs had been obliged to pay to keep the policy on foot. Best, C. J., there says: "The question is, whether there was any debt which the defendant undertook to pay. I am of opinion that there was none, either contingent or otherwise. The defendant merely undertook that R. should do certain acts. Upon the failure of R. in the due payment of the annual premium, the plaintiffs would have a claim on the defendant, as surety, for unliquidated damages, varying in amount according to circumstances. If R. was still living, the amount of damages would be the sum paid by the plaintiffs to keep the policy on foot; but, if he had died leaving the annual premium in arrear, the defendant would have been called upon to make compensation to the plaintiffs for the loss of their whole debt; or, if R. had left behind him the means of satisfying part of the debt, the plaintiff's claim on the defendant would be reduced pro tanto. Thus, there might be a multiplicity of causes tending to vary the amount of damages to which the defendant would become liable in consequence of his suretyship." And Gaselee, J., says: "It was but a liability for unliquidated damages, and therefore not a debt from which the defendant would be discharged under the 126th section." With respect to the claim for expenses occasioned by the principal's default, and for the loss sustained by the plaintiff in consequence of the noncompletion of the houses pursuant to the covenant—these clearly are claims for unliquidated damages, which have ever been held not to form the subject of proof under a commission (*d*).

(*d*) See *Utterson v. Vernon*, 3 T. 289; *Parker v. Crole*, 2 M. & P. R. 539; *Parker v. Norton*, 6 T. R. 150, 5 Bing. 63; *Yallop v. Ebers*, 695; *Pulteney v. Warren*, 6 Ves. 1 B. & Adol. 698.
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Alexander, contra.—Although the plaintiff might not, as the Court of Review seem to have thought (*Ex parte Thompson*, 2 Deac. & Ch. 126, 1 Mont. & B. 219), have an absolute right to prove under the former part of the 56th section, yet he might lodge his claim under the latter part. This and similar clauses in former bankrupt acts have always received a liberal construction—*Patterson v. Banks*, Cowp. 543; *Brookes v. Lloyd*, 1 T. R. 17; *Baxter v. Nichols*, 4 Taunt. 90, 2 Rose, 111; *Ex parte Grundy*, 1 Mont. & M'A. 293; *Ex parte Tindal*, 1 Mont. & M'A. 415, 8 Bing. 402, 1 M. & Scott, 607; *Ex parte Lewis*, 1 Mont. & M'A. 246; *Ex parte Myers*, 1 Mont. & B. 229, 2 Deac. & Ch. 251: in the latter of these cases, a debt on a guarantie which did not become absolute before the bankruptcy, was held to be proveable as a contingent debt. The cases of *Taylor v. Young*, *St. Martin (Overseers) v. Warren*, and *Hoffham v. Foudrinier*, 5 M. & Sel. 21, were decided upon the statute 49 Geo. 3, c. 121, ss. 9, 17, which afforded a very inadequate relief—see Mr. Justice Chambers' observations thereon in *Baxter v. Nichols*, 4 Taunt. 92. *Biré v. Moreau*, 12 Moore, 226, 4 Bing. 57, was a case of costs, which were held not to constitute a debt contracted within the meaning of the 56th section of the 6 Geo. 4, c. 16.

Adams, Serjeant, in reply.—In *Ex parte Myers*, the acceptance became due after the bankruptcy and before certificate; the case therefore fell within the latter part of the 56th section. In all the other cases that have been cited, where the proof has been allowed, there has been a debt payable on a contingency. Here, however, there is no contingency within the meaning of the statute, and originally no debt. Non constat, that, because there has been one default by the principal debtor, there will be further defaults. There is therefore no principle upon which the value can be ascertained.

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TINDAL, C. J., now delivered the judgment of the court:—The question arising upon this special verdict is, whether the several breaches of covenant stated in the declaration are either debts or are claims and demands which are by the statute made proveable under the commission; for, unless they fall within that description, the certificate will be no bar within the 6 Geo. 4, c. 16, s. 127, and consequently the plaintiff will be entitled to the verdict. Now, as to the breach of covenant which is lastly assigned in the declaration, viz. that Smallwood did not complete and finish the messuages therein described so as to make them fit for habitation on or before the 24th June, 1832—that is a demand for general and unliquidated damages, such as cannot be ascertained without the intervention of a jury, and is altogether incapable of forming the subject of a proof by the affidavit or deposition of the party himself. Such damages therefore can never be considered as a debt or demand proveable under a commission. Again, as to the second breach of covenant, which is for 30*l.* alleged to be the expenses, costs, and damages sustained by the defendant by reason of the non-payment of the annuity—that breach also appears to be open to the same objection as the last; besides which, it is clear, that, if the plaintiff has no right to prove under the commission the annuity itself, which is the principal debt, he cannot be allowed to prove these damages, which are only incidental and accessory to the annuity itself. The question therefore upon this record is reduced to the single point, whether the instalments of an annuity for the payment of which the bankrupt is surety only, and which he expressly covenants to pay in case of the default of the grantor, are proveable under a fiat against the surety, where such instalments do not become due until after the bankruptcy of the surety. And we are of opinion that they are not. If such a demand is proveable at all, it must fall within the provisions of the 56th section of the statute, and no other:

for, as to the 54th section, its object was to enable the annuity creditor of any bankrupt to prove for the value of an annuity under a commission against the grantor. But the plaintiff in this case is not the annuity creditor of the defendant, the bankrupt. The defendant neither granted the annuity nor covenanted absolutely for its payment: he only covenanted to pay in case the grantor should make default. It is clear therefore that the case is not within the 54th section. The 55th section was passed to enable the collateral surety for payment of an annuity to come in under a commission issued against the principal debtor. It is unnecessary to say that this section cannot apply to the present case, where the commission has been issued, not against the grantor of the annuity, but against the surety himself. No section therefore can possibly apply to this case except it be the 56th. That section provides for two cases—first, where there is “a debt payable upon a contingency which has not happened before the issuing of the commission;” in which case the commissioners are directed to ascertain the value thereof, and to admit the creditor to prove the amount so ascertained. The second case is, “where the value shall not be ascertained before the contingency shall have happened;” and in that event the creditor may, after such contingency shall have happened, prove in respect of the debt, and receive dividend with the other creditors, not disturbing any former dividends. The question is, whether the instalments mentioned in the first breach of the declaration fall within either the one or the other of these provisions. We think it clear that the quarterly payments of the annuity not falling due until after the issuing of the commission, are not comprised within the *first part* of the section. Before the days of payment arrive, these instalments are not only no debt, but can never become a debt from the surety, except in the event that Smallwood, the grantor of the annuity, shall make default in such payments. But

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the value of such a contingency it is impossible to calculate. The liability of the surety would depend upon the power and the will of the principal to pay the first quarter and also the subsequent instalments as they fell due: and it is needless to say that such a contingency cannot be subjected to any known law of calculation. And, accordingly, when the present plaintiff, before any quarterly payment became due, applied to the commissioner to ascertain the value of the annuity, and to allow him to prove such value, the commissioner rejected the proof: and we agree in the judgment given by the Court of Review, who held such rejection to be right—see *Ex parte Thompson*, 1 Mont. & Bligh, 219. If the instalments of an annuity are proveable at all, it must either be by proving the present value of the whole annuity, or by proving the separate value of each instalment as it falls due. But it is obvious that the act has made no provision for the proof of the present value of the annuity against the estate of the surety. If the whole annuity is allowed to be proved against the estate of the surety, there is no provision in the statute for reimbursing the estate of the surety by enabling the assignees to look to the principal debtor for indemnity: whereas, in the case of the bankruptcy of the grantor of the annuity, and the annuity being valued and proved against his estate, a provision is made for the indemnity of the surety, by the 55th section, namely, that the surety, by paying to the creditor the ascertained value of the annuity, may have the benefit of the proof of the annuity creditor against the bankrupt's estate. By this course the whole of the annuity transaction is closed as to all the parties, the grantor, the surety, and the annuitant. The absence, therefore, of any similar provision in the case of the surety becoming bankrupt, leads to the inference that it was not intended to provide for such case by the statute, but that it should be left as it stood at common law. And we think, that, as the whole value of the annuity is not proveable at once under

the 56th section, so neither is each particular instalment proveable after the contingency happens: for, the 54th section of the act deals with an annuity as a debt of a peculiar nature, and proveable in one way only; directing the present value of the whole annuity to be ascertained, and such whole value to be the subject of proof: not that each successive instalment shall be proved as it becomes due. And if the annuity is so dealt with under the 54th section, where the proof takes place against the grantor's estate, there is no reason to suppose the legislature would have treated it differently under the 56th section, as against the estate of the surety, if such annuity was intended to be proved under that section. And, indeed, it would be a great hardship on the annuity creditor to compel him to prove each separate instalment as it became due, that is, as the contingency of the default of the principal debtor happened, through a long series of years; for, that would in effect be to take away from him the whole benefit of his security, without giving him a real share under the estate. This decision does not in any manner over-rule the case of the proof against the estate of the guarantee or surety for a debt after the default of the principal, which proof was allowed in *Ex parte Myers*, 1 Mont. & Bligh, 229, 2 Deac. & Ch. 251; but is limited to the case before us, the proof of the instalments of an annuity. As therefore we consider that no part of the demand in this declaration was proveable under the commission against the defendant, we think there must be judgment for the plaintiff.

Judgment for the plaintiff.

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By the 57 Geo. 3, c. 97, s. 6, the commissioners of woods and forests are authorized and empowered to contract and agree with any person for the sale of any part or parts of the possessions or land revenues of the crown which shall in their judgment be desirable to be sold, and to give the purchaser a certificate in the form therein prescribed: and it is declared that the purchaser shall, after the enrolment of the certificate, "be deemed to be in actual possession and seisin of the premises,

THIS was an action of ejectment brought to recover the possession of certain lands in the county of Radnor. The declaration contained a demise by the lessor of the plaintiff on the 15th December, 1 Will. 4. The defendant pleaded not guilty. The cause was tried at the last Assizes for the county of Hereford, when the jury found a verdict for the lessor of the plaintiff, damages one shilling, subject to the opinion of the court upon the following case:—

The manor of Iscoed, in the county of Radnor, and the wastes within the same, were long before and at the time of making the inclosure hereinafter mentioned, and from thence forth until the conveyance to the lessor of the plaintiff hereinafter mentioned, in the possession of our lord the king, who was during all that time seised thereof in his demesne as of fee in right of his crown. Before and at the time of the said inclosure, the premises now in the possession of the defendant (and the possession of which is sought to be recovered by the present ejectment) were waste lands within and parcel of the said manor of

rights, and interests by him purchased, and that he shall hold the same as fully and amply to all intents and purposes as his majesty might have done if such sale had not taken place." In 1803, the defendant inclosed part of the waste of the manor of Iscoed (part of the demesnes of the crown), and remained in uninterrupted possession of the waste so inclosed until after the year 1826, when the manor of Iscoed was purchased from the crown by the lessor of the plaintiff. The property so purchased by the lessor of the plaintiff was described in the certificate of the commissioners as "all that the manor of Iscoed, with the rights, members, and appurtenances thereto belonging." In ejectment brought by the purchaser to recover the possession of the waste so inclosed by the defendant:—Held, that it did not pass under this contract of sale; for that the commissioners neither had the power under the statute to make sale of property so situated, nor by their certificate affected to exercise such power if they had it.

Although the king can never be put out of possession in point of law by the wrongful entry of a subject; yet there may be an adverse possession *in fact* against the crown. Therefore, after such an adverse possession by a subject for twenty years, the crown could only recover the land by an information of intrusion: consequently, ejectment would not lie at the suit of the grantee of the crown, notwithstanding the rights of the crown are not barred by the statute of limitations.

And *semble*, that, even if the waste land in question had not been out of the actual possession of the crown for twenty years, it would not, under the circumstances, have passed under the word "manor" in the certificate.

Iscoed. In the year 1803, the premises were, without the leave of the king, taken in from the said wastes, and were then inclosed, and have been held and occupied from that time to the present as inclosed land, separate and divided from the uninclosed and waste lands of the said manor; and no acknowledgment or payment of rent was proved to have been made by the occupier thereof. In the year 1806, the lessor of the plaintiff purchased from the crown the said manor of Iscoed and other property, and the same was conveyed to him by the following instrument, which was duly executed in conformity with the provisions of the 57 Geo. 3, c. 97:—

“ By the commissioners of his majesty's woods, forests, and land revenues.

“ These are to certify, that, in pursuance of a warrant from the right honourable the commissioners of his majesty's treasury of the united kingdom of Great Britain and Ireland, bearing date the 19th August, 1826, The Right Honourable Charles Arbuthnot and William Dacres Adams, Esq., two of the commissioners of his majesty's woods, forests, and land revenues, for and on behalf of the king's most excellent majesty, have contracted and agreed with James Watt, of Aston, in the county of Warwick, Esq., for the sale to the said James Watt of all that the manor of Iscoed, in the county of Radnor, with the rights, members, and appurtenances thereto belonging, and all those rents and yearly sums of money due and payable to the lord of the said manor, commonly called quit rents, rents of assize, and customary rents, whatsoever, to the said manor belonging or appertaining, due, payable, or issuing out of all and every the lands, tenements, and hereditaments reputed, accepted, taken, or known to be part or parcel thereof, or belonging to the said manor: and also all courts baron and courts leet, fines, waifs, estrays, deodands, escheats, forfeitures, reliefs, heriots, services, goods and chattels of felons and fugitives, of out-

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lawed persons, and of persons put in exigent, hawking, hunting, fishing, fowling, and all quarries of stone and slate of every description; and all other franchises, liberties, privileges, immunities, profits, commodities, and advantages, with all and every their appurtenances, to the said manor and royalties thereof belonging or in anywise appertaining (except, nevertheless, and always reserving to his majesty, his heirs and successors, out of the said sale for which the contracting and agreeing is hereby certified, all and every advowsons, free dispositions, rights of patronage, and presentations of churches, vicarages, and chapels within the said manor, and all fee-farm rents, not being manorial rents belonging to the crown as lord of the said manor, payable out of or in respect of any premises within the said manor; and also all mines and minerals whatsoever within the same, with full power to work the same and every of them, as fully and effectually as if this sale had not been made): which said manor and premises are part of the possessions or land revenues of the crown, within the ordering and survey of the court of Exchequer: at or for the price or sum of 1200*l.* of lawful money of Great Britain, to be paid by the said James Watt into the Bank of England, and carried to the account of the public monies of the commissioners of his majesty's woods, forests, and land revenues, being 'The woods and forests fund:' and, from and immediately after the payment of the same into the Bank in manner aforesaid, and the inrolment of this certificate and the receipt for the said purchase money in the office of the auditor of the land revenues for the county aforesaid, and thenceforth for ever, the said James Watt, and his heirs or assigns, shall be adjudged, deemed, and taken to be in the actual seisin and possession of the same hereditaments and premises so by him purchased, and shall hold and enjoy the same peaceably and quietly, freed and discharged from all claims and demands of his majesty, his heirs and successors, or of

any person or persons claiming under him or them (except as before is excepted), and in as full and ample a manner to all intents and purposes as his majesty, his heirs or successors, might or could have held or enjoyed the same if such sale had not been made. By force and virtue of an act of parliament passed in the 57 Geo. 3, c. 97, intituled 'An act for ratifying articles of agreement entered into by the Right Honourable Henry Hall, Viscount Gage, and the commissioners of his majesty's woods, forests, and land revenues; and for the better management and improvement of the land revenues of the crown.' Given under their hands this 30th December, 1826.

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" C. Arbuthnot, } Commissioners of
" W. D. Adams, } his majesty's woods,
 } forests, and land re-
 } venues.

" Signed by the above-named C. Arbuthnot }
and W. D. Adams, in the presence of } A. Milne, Sec.

1200*l*. " Received, the 2nd day of January, 1827, of and from
Entd. James Watt, above named, the sum of one thou-
E. Bryant. sand and two hundred pounds of lawful money of
 Great Britain, being the consideration money ex-
 pressed in the above-written certificate. Witness
 my hand—

" For the Governor and Company
" of the Bank of England,
" J. Champ, Cashier."

" Inrolled at the office of the auditor }
of Wales, 12 Jan. 1827, A. Badger, Act- }
ing Auditor." }

No demand of the possession of the premises was made upon the defendant Morris before the commencement of the ejectment; but a notice was on the 13th November, 1830, and before the commencement of the ejectment, served on Mr. Price, who was at that time the tenant in possession of the premises, and who before the ejectment delivered over such notice to his landlord, Mr. Parsons. Mr. Parsons is the landlord of the present defendant, Morris, and the real defendant in the ejectment. The notice was as follows :—

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" Mr. Edward Price—I do hereby give you notice to quit and deliver up to me, lord of the manor of Iscoed, on the 11th day of December next, the possession of the messuages, lands, tenements, and hereditaments which you or those under whom you claim have inclosed from the commons or waste lands of the said manor, and which you now hold, situate in the parish of Nantmel, in the county of Radnor; and that, unless you do so, an action to recover the same will be brought against you. Dated the 9th November, 1830. Your's &c.

" James Watt."

The said James Watt is the lessor of the plaintiff. The declaration in ejectment was served on the defendant on the 28th December, 1833.

The question for the opinion of the court was—Whether the lessor of the plaintiff was entitled to recover the possession of the premises by this ejectment.

The case was argued in Hilary Term last.

R. V. Richards, for the lessor of the plaintiff.—By the 57 Geo. 3, c. 97, s. 6, it is enacted "that, whenever the commissioners of his majesty's woods &c. for the time being shall have contracted with any person or persons, &c., for the sale of any of the possessions or land revenues of the crown thereby authorized to be sold for the purposes aforesaid, the said commissioners shall grant the purchaser thereof a certificate under their hands, describing the premises so agreed to be sold, and the amount of the purchase money to be paid for the same, &c.; and every such certificate, &c., shall within two calendar months after the date of such certificate be taken to the office of the auditor of the land revenue for the district within which the premises therein described are situate, and be there forthwith inrolled in the proper books for that purpose; and such auditor, having inrolled the said certificate &c., shall attest the same under his hand, and shall, upon receiving the usual

fees for such inrolment, return the said certificate &c. to the purchaser; and, from and after such inrolment, and thenceforth for ever, the respective purchasers, their heirs or successors, shall by force and virtue of this act be and be adjudged, deemed, and taken to be in the actual seisin and possession of the premises, rights, and interests to be by them respectively purchased, and shall hold and enjoy the same peaceably and quietly, freed and discharged from all claims and demands of his majesty, his heirs and successors, or of any person or persons claiming under him or them, as fully and amply to all intents and purposes as his majesty, his heirs and successors, might or could have held and enjoyed the same if such sale had not taken place." The question is, whether, by the certificate granted to him by the commissioners in pursuance of this enactment, the wastes of the manor in the possession of the crown within sixty years were so conveyed to the plaintiff as to entitle him to maintain ejectment for the recovery of them. In order to ascertain this, it will only be necessary to inquire what were the rights of the crown at the time of the conveyance; for, it is clear that the word "manor" used in the certificate has a signification sufficiently extensive to comprehend the waste lands belonging to the manor—Cruise's Digest, 39, where all the cases are collected. The king can never be turned out of possession by an intrusion or other wrongful act of a subject. In Co. Litt. 41. b., it is said: "Against the king there shall be no *occupant*, because *nullum tempus occurrit regi*; and therefore no man shall gain the king's land by priority of entry." Again, Co. Litt. 57. b.: "Against the king there is no tenant at sufferance, but he that holdeth over in the cases above said [after the death of *cestui que vie*, or the determination of the term] is an intruder upon the king, because there is no laches imputed to the king for not entering." In Viner's Abridgment, *Prerogative of the King*, (Q. 4), it is said: "The king cannot have action

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which *proves him out of possession*, as, assise or ejectione firmæ, nor action upon the statute of 8 H. 6, of forcible entry, quod expulit et amovit; and this is of things local and personal: contra of things transitory, as, quare impedit, ravishment of ward, &c.; and in the other case there shall be office or information." So, in Bacon's Abridgment, *Prerogative*, (E) 6., it is said: "If the king be seised of the manor of B., and a stranger erect a shop in a vacant part of it, and take the profit of it without paying any rent to the king, and after the king grant over the manor in fee, and the stranger continue in the shop and occupy it as before, this is no disseisin; for, the first entry of the stranger was no disseisin, but an intrusion on the king's possession; for that the king's title appearing on record, the entry in pais, which is not an act of equal notoriety, will not divest it out of him; if, then, the king is not disseised, his conveyance of the freehold is good, and the grantee is seised by virtue of it, and consequently cannot be said to be disseised by the stranger who has made no entry on him after the king's conveyance, but only continued the old interest which he had before the grant; and so remains an intruder still, and liable to an action of trespass or ejectment for it." In *Elvis v. The Archbishop of York*, Lord Hobart says (Hob. 322): "There are certain things wherein a possession cannot be gained—first, for privilege of persons; for, the king cannot be disseised, but all intruders are but trespassers to him, and if he will he may charge them by actions of account, as bailiffs, &c." If these wastes had been in the possession of the crown at the date of the certificate, they would beyond doubt have passed by it to the lessor of the plaintiff; for, all the rights and interests of the crown are thereby conveyed, in the same manner as the crown itself was entitled. Inasmuch, therefore, as there could be no adverse possession against the crown at the time the certificate was granted, so neither can there be against the lessor of the plaintiff.

E. V. Williams, for the defendant.—It may be conceded that the king cannot be ousted by a subject, nor barred or affected by the adverse possession of a subject: but, though he cannot be ousted, he may *in fact* be out of possession. The points proposed to be argued are—first, that the wastes for which this ejectment was brought, did not pass to the lessor of the plaintiff by the contract entered into by him with the commissioners; and that they never intended to pass them—secondly, that, under the circumstances stated in the case, the right of maintaining an ejectment is barred by the statute 21 Jac. 1, c. 14, s. 1.

1. Admitting that the king had not been ousted in point of law; and that, if ousted in point of fact, he would not be put to an ejectment, but might bring an information in the nature of an intrusion: yet he was not in such a position with regard to these wastes as to enable him to grant to a subject the right to recover them by ejectment. By the 21 Jac. 1, c. 14, s. 1, it is enacted, “That, whenever the king hath been or shall be *out of possession* by the space of twenty years, or shall not have taken the profits of lands &c. within the space of twenty years before any information of intrusion brought to recover the same, in every such case the defendant may plead the general issue, and shall not be pressed to plead specially; and that, in such cases, the defendant shall retain the possession he had at the time of the information exhibited, until the title be tried, found, or adjudged for the king.” Here, the case finds that the defendant had been in undisturbed possession for twenty three years. And by the 9 Geo. 3, c. 16, s. 1, it is enacted that the king shall not at any time thereafter sue, impeach, question, or implead any person of or concerning any manors, lands, &c., by reason of any right or title which hath not first accrued or grown within the space of sixty years next before the first commencing of any suit by his majesty. It is clear, therefore, that there may be an adverse possession *in fact*

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against the crown. Such being the rights of the crown and the situation of the defendant, can the grantee of the crown be placed in a more favourable position than the crown itself? Was the right to this property one that the commissioners could by the 57 Geo. 3, c. 97, convey to a subject? Rights of entry are the same as to real property that chuses in action are with respect to personal property; and the assignment of such rights is expressly prohibited by the 32 Hen. 8, c. 9. [*Tindal*, C. J.—Does the 32 Hen. 8, c. 9, bind the crown? That the crown may assign a chose in action is clear—Com. Dig. *Assignment*, (C. 1.), (D.)] But he cannot assign a right of entry (a)—3 Leon. 198; Vin. Abr. *Prerogative of the King*, (G. b. 3), pl. 7. There are many cases in which the king is bound by an act of parliament. In *The Case of Ecclesiastical Persons*, 5 Rep. 14. b., it is said: “In divers cases the king is bound by act of parliament, although he be not named in it, nor bound by express words. And therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the king although he be not named; for, religion, justice, and truth are the sure supporters of the crowns and diadems of kings. And therefore it is agreed in 35 H. 6, 60, that the king shall be bound by the statute of Westminster 2nd, c. 5, which makes provisions against tortious usurpations, although the king be not named in the act. So, in the *Lord Barkley’s* case, reported by Mr. Plowden (243. b. &c.), it is adjudged, that, if a gift in tail be made to the king, he cannot alien to defraud him in reversion, or his issue, but is bound by the statute of Westminster 2, De donis conditionalibus. And the said act of 1 Eliz. proves that acts which restrain ecclesiastical persons from wasting their possessions, which were given to maintain the service

(a) Unless by express words. 3 Rep. 4. b., 11. a.

of God, shall bind the king, if special provision had not been made to the contrary by the same act: Et summa ratio est quæ pro religione facit."—[*Tindal*, C. J., referred to the case of *Lambert v. Taylor* (b), 6 D. & R. 188, 4 B.

(b) Assumpsit against executors. Declaration stated that the testator, at the time of his death, was indebted to J. Y. in 200*l.* and interest, upon a promissory note; that, after the death of J. Y., the note being unpaid, it was found before the coroner, upon view of the body of J. Y., then lying dead, by the oaths of lawful men, that J. Y. was *felo de se*, prout patet per recordum of the inquisition; by reason of which inquisition and felony J. Y. forfeited the note &c. to the king; that the king, by grant under his sign manual, assigned the note to the plaintiff, as mentioned in a certain other inquisition, and delivered the note to the plaintiff, of which the defendants, after the testator's death, had notice. Breach, non-payment either by the testator or the defendants. Pleas—first, testator non assumpsit—secondly, that the note became due and payable to J. Y. during his life, and the causes of action did not accrue to him within six years before exhibiting the plaintiff's bill, and issue thereon—thirdly, nul tiel record of the coroner's inquisition, and issue thereon—fourthly, that there was no such grant as the plaintiff alleged. The second issue was found for the defendants, and all the others for the plaintiff.

On motion to enter a non-suit—

Held—first, that the second inquisition mentioned in the grant was an office of instruction only, and not of entitling, and need not be produced at the trial—secondly, that the grant passed the property in the note, though under the sign manual only.

On motion in arrest of judgment—Held—first, that the declaration sufficiently shewed the note to be a security for a debt, and that the debt and security passed to the crown by operation of law, and were assignable by the crown without indorsement—secondly, that, after verdict, the court would presume the coroner's inquisition to have been found by twelve jurors, if twelve were necessary, as to which point, *quære*.

On motion to enter judgment for the plaintiff non obstante veredicto—Held—first, that the plea of the statute of limitations was bad, for not shewing that J. Y.'s right of action was barred by the statute at the time of his death—secondly, that the king, not being named in the statute, was not within its operation,—thirdly, that the plea confessed a cause of action in J. Y., which passed from him to the crown, and from the crown to the plaintiff, and did not allege sufficient matter in avoidance: therefore the plaintiff was entitled to judgment non obstante veredicto.

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& C. 138].—The king having been out of possession so long, that, if this were the case of a subject, ejectment would not lie, it may also be a question whether the king himself would not be put to an inquest of office before he could recover—Com. Dig. *Prerogative* (D. 63); *Sir George Reynel's* case, 9 Rep. 95.

It was not competent, therefore, to the commissioners to convey to the lessor of the plaintiff such a title as to enable him to maintain this action. By the 1 Anne, stat. 1, c. 7, s. 5, all grants of manors, lands, &c., of the crown are declared void if made for more than thirty-one years or three lives. That statute is to a certain extent repealed by the 57 Geo. 3, c. 97 (a): and it is only by this latter act that the conveyance in question can be good at all. That act, besides enabling the commissioners to sell manors, contains a provision enabling them to sell wastes separate and distinct from manors: such a provision never would have been inserted in the act if wastes had been intended to pass by the word "manor."

The certificate of the commissioners, therefore, never could have been intended to include this property, of which the crown itself could only obtain the possession by putting in motion its prerogative process. Besides, under the peculiar circumstances of this case, in order to the quieting of possessions, the court may probably presume such a grant of the property in question as will defeat this action; notwithstanding the rule of law that no grant by the king can be presumed: for, by the 48 Geo. 3, c. 73, s. 11, the surveyor-general is impowered to sell wastes the possession of which had been usurped or incroached upon, and by s. 28, to exchange lands: so that it is possible that the surveyor-general might, at the time of passing that act, have made a grant of this very land.

R. V. Richards, in reply.—Whether a grant is to be

(a) See the 9 Geo. 4, c. 70.

presumed or not, is essentially a question for the jury, and not for the court; and there is nothing on the face of this case to warrant any such presumption. Whatever the crown did not intend to pass is expressly excepted out of the grant. Where the manor itself is conveyed, the waste passes as incident to it. The specific power given to the commissioners by the 57 Geo. 3, c. 97, as to the sale of waste lands, was given for the purpose of enabling them to sell wastes separated from the manor. Cur. adv. vult.

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TINDAL, C. J., now delivered the judgment of the court:—Two objections have been taken by the defendant against the plaintiff's right to recover in this ejectment—one, that the inclosed parcels of waste land for which this ejectment is brought did not pass to the lessor of the plaintiff under the contract of sale made by the commissioners—the other, that, under the circumstances stated in the special case, the right of maintaining an ejectment is barred by the statute of limitations, 21 Jac. 1, c. 14, s. 1. And we think, upon the best consideration we can bring to this case, which is altogether new in its circumstances, the inclosed parcels of waste which form the subject of this action did *not* pass from the crown to the purchaser under the contract and certificate set forth in the special case.

In order to ascertain whether those inclosures passed or not, it will be convenient to consider—first, what was the exact interest or right of the crown in such inclosures at the time the certificate of the commissioners was granted—secondly what interests or rights of the crown the commissioners are empowered or authorised by the statute 57 Geo. 3, c. 97, to sell to purchasers—and lastly, whether the certificate is so framed as to pass the interests or rights of the crown in the same, supposing the commissioners to have power to make sale thereof.

I. As to whether the inclosures passed to the lessor of the plaintiff under the contract of sale made by the commissioners.

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1. What was the interest or right of the crown in the inclosures at the time the certificate was granted.

First, at the time of making the contract, that is, in 1826, it appears from the facts stated in the special case, that, with respect to the parcels of waste lands in question, there had been a possession adverse to the crown for twenty-three years, during which time they had been separated and divided from the uninclosed and waste lands of the manor. In the course of the argument, considerable stress was placed by the counsel for the plaintiff on the general and acknowledged principle of law, that the king can never be put out of possession by the wrongful entry of a subject. The authorities cited, Co. Litt. 41. b., 57. b., 227. b., and Stamf. Prærog. Reg. 56. b., are quite decisive on that point. And, upon that principle, it was further contended, that, at the time of making the contract, the king was as fully in possession of those parts of the wastes of the manor which were wrongfully inclosed, as of the remainder of the wastes which were still uninclosed. It may be doubtful whether the general expression above referred to did, at any time, intend more than that the remedies given by the law to the king for such a wrong, were remedies which supposed him to be still remaining in possession; such as, an information of intrusion, which was in the nature of an action of trespass *quare clausum fregit*; or the right to charge the trespassers in account, as his bailiffs, for the profits of the premises of which the possession was so wrongfully taken. At all events, however, giving the fullest extent to that common law principle, since the statutes 21 Jac. 1, c. 14, and 9 Geo. 3, c. 16, it seems impossible, to contend that there may not be a possession adverse to the crown in point of fact, whatever may be its construction in point of law; for, the former statute begins by providing a remedy wherever the king hath been out of possession by the space of twenty years; and the statute 9 Geo. 3, c. 16, enacts that the king shall not at any time thereafter sue, impeach, question, or implead any person of or concerning any

manors, lands, &c., by reason of any right or title which hath not first accrued or grown within the space of sixty years next before the first commencing of any suit by his majesty. Under both which statutes, and more particularly under the former, is contained a legislative recognition that there may be an adverse possession in fact against the crown, however in point of law, with respect to the nature of the remedy, the possession may still be considered as in the king. But it is to the statute 21 Jac. 1, c. 14, that reference must more particularly be made in order to determine the exact position and rights of the crown as to the inclosures which are the subject of this action, at the time of making the contract. By that statute it is enacted, "that, wherever the king hath been or shall be *out of possession* by the space of twenty years, or shall not have taken the profits of lands &c. within the space of twenty years before any information of intrusion brought to recover the same, that, in every such case, the defendant may plead the general issue, and shall not be pressed to plead specially; and that, in such cases, *the defendant shall retain the possession he had at the time of the information exhibited, until the title be tried, found, or adjudged for the king.*" Now, the inclosures in question having been made and continued for more than twenty years before the contract, and during the whole of that period the occupiers of the same having been in actual though wrongful possession, and no part of the profits thereof having been taken by the crown within the last twenty years, it follows necessarily from the enactments of the statute, that, if the crown at the time of making the contract had been desirous to regain the possession in fact, it must have brought an information of intrusion; and that, if such information had been brought, and the defendant had pleaded the general issue, the defendant would have been entitled to retain the possession which he then had against the crown, "until the title was tried, found, or adjudged

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for the king." (d) If such, then, was the right of the crown, and such the situation of the intruder even against the crown itself, it is obvious that the purchaser cannot be in a better or more favourable condition; for, by the express enactment of the statute 57 Geo. 3, c. 97, s. 6, the purchaser, after the enrolment of the certificate, "shall be deemed to be in actual possession and seisin of the premises, rights, and interests by him purchased, and shall hold the same as fully and amply to all intents and purposes *as his majesty might have done if such sale had not taken place.*"

(d) See the 10 Geo. 4, c. 50, s. 96, by which, after reciting that "Whereas many purprestures, incroachments, and trespasses have been made and continued upon the soil of his majesty within the boundaries of some of the royal forests, which have been used and occupied by the person or persons in possession thereof, or others under whom they claim, without any effectual interruption by or on the part of his majesty: and whereas in some cases it would be expedient to permit such persons to continue in possession under certain regulations, and in others to make compensations for the surrender of such possessions:" it is enacted, "that, in all cases of purprestures or incroachments in any of the royal forests, which purprestures or incroachments shall appear to have been inclosed or used and occupied by the person or persons then in possession thereof, or by any person or persons under whom the same are respectively claimed to be held, without any effectual interruption by or on

the part of his majesty, for any period not less than ten years, it shall be lawful for the said commissioners for the time being of his majesty's woods, forests, and land revenues to make satisfaction or compensation in money, in consideration of the removal, abatement, or resumption of any such incroachment or purpresture, or to grant to the person or persons in possession of such incroachment or purpresture a lease for any term not exceeding three lives or thirty-one years, either of such incroachments or purpresture, or any other part or parts of the forest in lieu thereof, as to the said commissioners shall under the circumstances of the case appear reasonable and proper: Provided that there shall be reserved in every such lease such annual rent or rents to be paid to his majesty, his heirs and successors, as under all the circumstances of the case shall by the said commissioners for the time being of his majesty's woods, forests, and land revenues, be deemed reasonable and proper."

Such being the rights of the crown previous to and at the time of making the contract of sale by the commissioners, the next question is, whether the commissioners have power, under the 57 Geo 3, c. 97, to make sale and dispose of property the actual possession whereof the crown could not recover except by a prerogative process in a court of law. And in construing that statute, we think no reliance ought to be placed upon the acknowledged doctrine that the king may by his prerogative assign a right of action or a chose in action; because this is no conveyance or assignment by the king at all; it is a sale by commissioners, who are putting in force the powers for the first time given to them by that statute: and we think that statute must be construed by the same rules of construction as any other act of parliament. Now, by the second section of that statute, the commissioners are authorized or impowered to contract and agree with any person for the sale of any part or parts of the possessions or land revenues of the crown which shall in the judgment of the commissioners be desirable to be sold; which possessions the section proceeds to distribute into two distinct classes of property there enumerated, of which the first comprises incorporeal, and the second corporeal hereditaments. And we think it is only necessary to read the clause to be able to see that there is nothing contained in it which points in the most remote way to the giving the commissioners any authority or power to sell to the subject a right of recovering the possession of wastes, or any property whereof the crown was not in possession in fact, although in contemplation of law it might be deemed to be so for some purposes—whether such recovery was to be effected by bringing a writ of intrusion, or by the finding of an office, or by any other prerogative process whatsoever.

But, thirdly, even admitting the commissioners to be invested with the power to contract for the sale of the right to

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2. What interests or rights of the crown the commissioners are by the 57 Geo. 3, c. 97, impowered to sell.

3. As to whether the certificate was so

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recover the possession of these lands, have they in point of fact exercised the power on the present occasion? We think they have not. That the certificate must contain a description of the premises agreed to be sold, appears from the sixth section, which enacts that they shall grant to the purchaser a certificate, under their hands, "describing the premises to be sold." Now, the description in this case is simply that of the manor of Iscoed, with the rights, members, and appurtenances thereto belonging, and all rents, &c., courts baron, and other incidents thereto. The only operative word with respect to the subject of this dispute, is, "manor;" but, admitting the generality of that term in its utmost latitude, and holding it to comprise all demesne lands and wastes of the manor, we think it cannot be contended, upon any principle of legal construction, to include land in the possession of strangers who could not be turned out of possession thereof, except by information or inquest of office. Besides, under the information of intrusion, the crown would not only be entitled to a judgment that the defendant shall be removed from the possession, but in some instances to a judgment for damages also; as, where the wrong-doer has cut the king's trees—Savil. Rep. 49—a consequence still further removed from the sale of the manor to a subject. And even if these parcels of waste land had not been out of the actual possession of the crown for twenty years, so as to fall within the statute of 21 Jac. 1, c. 14; yet, if they had been separated and divided from the remainder of the wastes of the manor and held adversely to the crown for so long a period of time as to be publicly and generally known, by name or otherwise, as parcels of land distinct from the wastes of the manor, we should have been strongly of opinion that such inclosures would not have passed under the word manor, the only word in the certificate which is descriptive of land of any kind: the more

particularly, as the statute points to the necessity of a description of the premises contracted to be sold, to enable the officers of the crown to know what is left, and as, in the enumeration of such property, the word *manor* is found in that division which comprises incorporeal hereditaments, and *waste lands* in that class of words which comprises hereditaments of a corporeal nature.

We hold it unnecessary therefore to enter upon the discussion of the effect and operation of the statute of limitations upon the present action of ejectment; as we ground our judgment on the points of law before particularly mentioned—that the intruders, after twenty years' adverse possession, were protected even against the crown itself, until a judgment in intrusion; that the commissioners were not impowered by the statute to sell any property of the crown so circumstanced; and that there is nothing in this certificate of sale to shew that they intended to do so, even if they had the power. And we think this determination is consistent with the justice of the case no less than with the law; for, great fraud might be often practised on the crown, if, under a contract of sale by so general a description as that of the present, all incroachments should be held to be included, to any value, however great, and however antient, so that they were made within the last sixty years: and, on the other hand, great hardship might be frequently occasioned to persons who would never have been disturbed in their enjoyment, however wrongfully acquired originally, if the manor had still remained in the hands of the crown. It is sufficient to advert to the later statute, 10 Geo. 4, c. 50, s. 96, which is made in *pari materia* with the present act, to shew the great tenderness and clemency on the part of the crown towards persons in possession of incroachments of much shorter date than that which occurs in this case. For the reasons above given, we think there must be judgment for the defendant.

Judgment for the defendant.

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II. As to the effect and operation of the statute of limitations.

10 Geo. 4, c.
50, s. 96.

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BRADSHAW v. EDWARD SKILBECK, Administrator of
MARY SKILBECK, deceased.

The testator devised leaseholds to trustees, their heirs, &c., in trust to permit and suffer his daughter to receive the rents &c. for life; remainder to her two eldest sons for life, and, if but one, then wholly to that one; and in case the daughter should not have a son or sons to attain the age of twenty-one, and such sons dying without lawful issue, then to her daughters, their executors &c.; and in case the testator's daughter should die without lawful issue, then over: all the rest and residue of his real and personal estate he gave in trust for his daughter:—Held, that, under this devise, the testator's daughter took an express estate for life, with a remainder to her two eldest sons, for their lives, with the ultimate remainder in the term, on certain contingencies, to herself; and consequently, that, on the death of one of those sons without issue, his moiety in the term came to his mother, either under the devise over in case of the general failure of issue in her, or, at all events, under the residuary clause of the will.

THIS was an action of assumpsit to recover the amount of a promissory note for 103*l.* 13*s.* 9*d.*, dated the 1st June, 1831, made by the intestate, Mary Skilbeck, and delivered to the plaintiff; and also to recover the sum of 8*l.* 5*s.* 6*d.* for medicines and attendance as an apothecary. The defendant pleaded plene administravit præter 24*l.* 9*s.* The plaintiff signed judgment by default as to the 24*l.* 9*s.*, and in his replication traversed the plene administravit præter, and upon that traverse issue was joined. By mutual consent the following case was submitted for the opinion of the court:—

On the 1st January, 1831, Mary Skilbeck made the promissory note mentioned in the declaration, which still remained in the plaintiff's hands unpaid. She was also at the time of her death indebted to the plaintiff in the sum of 8*l.* 5*s.* 6*d.*, which likewise remained unpaid. Mary Skilbeck was the only daughter of Edward Hepworth, who by his will, after charging his personal estate with the payment of debts &c., gave all his leasehold buildings, lands, and grounds in Huddersfield, or near thereto, to Robert Firth and John Hirst, to hold to them, their heirs, executors, administrators, and assigns, in trust to permit and suffer his daughter Mary to receive the rents and profits thereof for and during the term of her natural life; and, from and immediately after her decease, to her two eldest sons for and during the terms of their natural lives, as tenants in common, and not as joint-tenants, (if but one, then wholly to that one); but charged and chargeable, if only one son, with the payment of 50*l.* each to the younger

children which my said daughter may have, but, if there should be two sons, then only with the payment of 20*l*. each to the younger children which my said daughter may have: But, in case my said daughter Mary should not have a son or sons to attain the age of twenty-one years, and such sons dying without lawful issue, then I give and bequeath the same unto all and every the daughters of my said daughter Mary, their executors, administrators, and assigns; if only one daughter, then wholly to that one, and to her or their legal representatives. But, in case my said daughter should happen to die without lawful issue, then I give and bequeath the same unto the two eldest sons of my brother Daniel Hepworth for and during the term of their natural lives, as tenants in common, and not as joint-tenants, (if but one, then wholly to that one); and from and immediately after his or their decease, then I give and bequeath the same unto their lawful issue. But, in case my said brother Daniel shall not have any sons, or such sons should not have lawful issue, then I give and bequeath the same unto all and every the children of my sisters Ellen, Betty, and Ann, and their legal representatives, as tenants in common, and not as joint-tenants, and to their executors, administrators, and assigns for ever. Provided, and my will and mind is, that my said trustees, or a majority of them, shall so often as it is necessary receive and take the rents, issues, and profits of all the above-mentioned premises, for the purpose of renewing the lease or leases, and paying the fine due to Sir John Ramsden or to the ground landlord for the time being for the same. Also I give and bequeath unto George Hepworth and Edward Hepworth, two of the sons of my said brother Daniel, the legacy or sum of 10*l*. a piece when and as they attain the age of twenty-one years. Also I give and bequeath unto Edward and Thomas, two of the sons of my sister Ellen, the legacy or sum of 5*l*. each when Thomas attains the age of twenty-one years: and I do

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Will of Edward
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direct that they shall receive lawful interest for the same from twelve months after my father's decease. All the rest, residue, and remainder of my household furniture, goods, stock in trade, debts due and owing to me, and all other my real and personal estate whatsoever and wheresoever, I give and bequeath the same and every part thereof unto my said executors and trustees, but charged and chargeable with the payment of all my just debts, funeral expenses, charges of proving this my will, and the last-mentioned legacies of 10*l.* each and 5*l.* each to my nephews: In trust for my said daughter Mary, so that the same may be at her sole and separate disposal when and as she shall request the same. The will also contained clauses authorizing the executors or trustees to reimburse themselves out of the personal estate all the charges and expenses incurred in the execution of the will and the trusts thereof, and declaring that they should not be accountable for the loss of any money which might have come into their hands, unless such loss had happened through their neglect or default, and that they should severally be answerable only for their own respective acts and deeds.

Death of testa-
tor.

The above will was signed and published by the testator on the day of its date, in the presence of and attested by two subscribing witnesses. The testator died some time in the year 1799, without revoking or altering the above will. At the time of making his will, and also at the time of his death, he was possessed of a leasehold interest in the buildings, lands, and grounds particularly mentioned in it, which is still subsisting. The will was duly proved by the executors and executrix named in it. Mary Skilbeck entered into the possession of the leasehold property mentioned in the will soon after the death of the testator, and continued in the possession of it until her death hereinafter mentioned. At the time of the making of her father's will, and also at the time of his death, she had two sons, Edward (the present defendant) and Matthias. After

State of the
family.

his death she had a daughter who died at the age of seven years, and two other sons, John and Thomas. The four sons lived to attain their majority; but Matthias died in 1820, and Thomas in 1826, both intestate and unmarried. The husband of Mary Skilbeck died some time in the year 1814, before any of the sons had attained their majority; and she herself died intestate on or about the 9th November, 1833. The defendant, upon the death of his mother, took out letters of administration to her personal estate, and entered into the possession of the leasehold premises particularly mentioned in the will of Edward Hepworth, and has from that time until the assignment hereinafter mentioned received the rents and profits to a considerable amount. He has also since that assignment continued in the receipt of the rents and profits of the premises.

John Hirst, one of the executors and trustees named in the will of Edward Hepworth, died soon after his testator. Robert Firth, another of the executors and surviving trustee, died on or about the 1st January, 1828, leaving his son Thomas Firth his sole executor, who duly proved his will. The legal estate in the leasehold property comprised in the will of Edward Hepworth became thus vested in Thomas Firth.

By an indenture of assignment bearing date the 11th November, 1834, and made between the said Thomas Firth, therein described as Thomas Firth, of &c., executor of Robert Firth deceased, of the one part, and the defendant in this cause, therein described as E. Skilbeck, of &c., administrator of his mother, Mary Skilbeck, deceased, of the other part, and duly executed by the parties thereto on the day on which it bears date—after reciting (amongst other things) the will of Edward Hepworth, and that Robert Firth had survived his co-trustee, and, in the exercise of his office of such trustee, had some time in the year 1834 applied for and obtained from the said Sir John

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Death of Mary Skilbeck—Defendant her administrator.

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Ramsden a renewal of the lease of the premises mentioned in the said will, and that the said T. Firth, after the death of his father, in like manner in the exercise of his office of executor of his father Robert Firth, had lately applied to and obtained from the said Sir John Ramsden a further renewal of the lease of the said premises, and that the said renewed lease was dated the 1st February, 1834, and made between the said Sir John Ramsden of the one part, and the said Thomas Firth of the other part, and thereby the said Sir John Ramsden demised to the said Thomas Firth, his executors, administrators, and assigns, the said premises mentioned in the said will, for the term of sixty years from the 1st May then next, at the yearly rent of 16*l.* 10*s.*, subject to the covenants and provisions therein contained, and with the covenant of the said Sir John Ramsden for the renewal of the said lease at the expiration of twenty years on payment of a fine of 33*l.* 4*s.*, or at the expiration of forty years on payment of a fine of 166*l.*; and that the said Thomas Firth claimed to be entitled as such executor of his late father to the repayment of the sum of 125*l.* paid and expended by his late father and himself in procuring the said renewed leases or otherwise upon or about the said premises and the execution of the trusts of the said will; and that the said Edward Skilbeck, being entitled to the possession of the said leasehold premises either in his own right or as administrator of his said mother, the said Mary Skilbeck, deceased, had applied to the said Thomas Firth to assign the same to him, which the said Thomas Firth agreed to do upon payment of the said sum of 125*l.* : It was witnessed, that, in consideration of the sum of 125*l.* to the said Thomas Firth in hand paid by the said Edward Skilbeck, the receipt whereof the said Thomas Firth did thereby acknowledge, and did discharge the said Edward Skilbeck and the said leasehold premises therefrom; he the said Thomas Firth did thereby bargain, sell, assign, transfer, and set over, remise, release, and

quit claim unto the said Edward Skilbeck, his executors, administrators, and assigns, the said buildings, lands, and grounds comprised in the will of the said Edward Hepworth, with the appurtenances : Habendum for the residue of the term of sixty years, and for every renewed term of years to be granted thereof, as fully and effectually to all intents and purposes as the same had at any time theretofore been held or enjoyed ; subject, nevertheless, to such covenants, payments, provisoes, and conditions as were contained in the said lease, and also subject to the payment of 20*l.* a piece to the younger children of the said Mary Skilbeck, and to such of the trusts of the will of the said Edward Hepworth as then remained unperformed.

The lease of the property in question was of far greater value than the sum of 125*l.* paid by the defendant to Thomas Firth (supposing that sum to be a charge upon the lease) and the legacies of 20*l.* to each of the younger children of Mary Skilbeck, and other unperformed trusts of Edward Hepworth's will, if any. Administration had not been taken out by any person to the personal estate of Matthias Skilbeck.

The pleadings were to be considered as part of the case. The 24*l.* 9*s.* assets confessed were quite independent of any interest which Mary Skilbeck might have had at the time of her death in the leasehold property comprised in Edward Hepworth's will.

The questions for the opinion of the court were—first, whether Mary Skilbeck (besides her life estate) took under the will of Edward Hepworth any and what interest in the leasehold premises comprised therein, either directly or through Matthias as one of his next of kin—secondly, whether such interest or the rents and profits received by the defendant since the death of Mary Skilbeck, or any part thereof, taking into consideration the subsequent assignment of the legal estate to the defendant, formed assets in his hands as her administrator, so as to negative the

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plea of plene administravit præter 24l. 9s. If the court should be of opinion that that interest or those rents and profits, or any part thereof, formed, under the circumstances of this case, such assets; then it was agreed that the plaintiff should recover his whole claim, in the same manner as if he had succeeded upon the issue of plene administravit præter 24l. 9s.: but, if the court should be of a contrary opinion, then, that the defendant should have judgment, in the same manner as if *he* had succeeded on that issue; and that, in either case, the judgment should be entered in such form as the court should direct.

First point.

Cleasby, for the plaintiff.—Under the devise in question the interest of the two eldest sons of Mary Skilbeck was an estate for life as tenants in common, Mary Skilbeck taking the absolute interest, subject to such life estates, either under the express devise to her, or at all events under the residuary clause—*Hind v. Lyon*, 2 Leon. 64; *Pells v. Brown*, Cro. Jac. 590; *Bacon v. Hill*, Moore, 464; *Toovey v. Bassett*, 10 East, 460; *Lethieulier v. Tracy*, 3 Atk. 784; *Forth v. Chapman*, 1 P. Wms. 667: and, upon her decease (her second son, Matthias, having died in her life time) the leaseholds in question, subject to the life interest of the defendant, Edward, her eldest son, became assets in his hands as her administrator.—The leaseholds would constitute legal assets, notwithstanding the several interests were only equitable, the legal estate being in the trustees—*Sheppard's Touchstone*, 496; *Deering v. Torrington*, 1 Salk. 79; *Hawkins v. Lawe*, 1 Leon. 155; *Alexander v. Lady Gresham*, 1 Leon. 225; *Harecourt v. Wrenham*, Moore, 858; *Anonymous*, 1 Rol. R. 56; Com. Dig. *Assets* (C); *Willson v. Fielding*, 2 Vern. 763; *Sir Charles Cox's case*, 3 P. Wms. 341; *Vincent v. Sharp*, 2 Stark. 507; *Clay v. Willis*, 2 D. & R. 539, 1 B. & C. 364; *Barker v. May*, 4 M. & R. 386, 9 B. & C. 489; *Powell on Devises* (by Jarman), 666.—Whatever difficulty may exist as to the term itself,

Second point.

—The leaseholds would constitute legal assets, notwithstanding the several interests were only equitable, the legal estate being in the trustees—*Sheppard's Touchstone*, 496; *Deering v. Torrington*, 1 Salk. 79; *Hawkins v. Lawe*, 1 Leon. 155; *Alexander v. Lady Gresham*, 1 Leon. 225; *Harecourt v. Wrenham*, Moore, 858; *Anonymous*, 1 Rol. R. 56; Com. Dig. *Assets* (C); *Willson v. Fielding*, 2 Vern. 763; *Sir Charles Cox's case*, 3 P. Wms. 341; *Vincent v. Sharp*, 2 Stark. 507; *Clay v. Willis*, 2 D. & R. 539, 1 B. & C. 364; *Barker v. May*, 4 M. & R. 386, 9 B. & C. 489; *Powell on Devises* (by Jarman), 666.—Whatever difficulty may exist as to the term itself,

it is perfectly clear that, even supposing that under Hepworth's will the two sons, Edward and Matthias, on attaining twenty-one, took the leaseholds absolutely as tenants in common in tail; still the share of the rents and profits which Mary Skilbeck, the mother, would take in Matthias's moiety under the statute of distributions, and which was received by the defendant, would be assets in his hands.

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Wightman, contra.—This case is to be considered as though the devise were a direct devise to the testator's daughter for life, and after her decease to her two eldest sons for life, and, they dying without issue and under twenty-one, then over: and, if so, it is perfectly clear that they would take the entire interest. Formerly, it was held that there could be no limitation over of personal chattels—*Bac. Abr. Legacies and Devises*, (K.); inasmuch as such limitations tended to that sort of perpetuity which the law discouraged. [*Tindal*, C. J., referred to *Co. Litt.* 20. a. note 120, by Hargrave and Butler, where the substance of the cases is collected.] It was clearly the intention (apparent from the pecuniary charges which immediately follow the devise to them) of the testator, that, on the death of Mary Skilbeck, the term should vest absolutely in the two sons on their attaining twenty-one. —Then it is said, that, Matthias dying without issue and intestate, his mother, Mary Skilbeck, is entitled, under the statute of distributions, to some interest which would be assets. Even if this were so, the argument is answered by the fact of there being no administration taken out to the effects of Matthias; consequently his portion can never be legal assets in the hands of the defendant as the personal representative of his mother. And the leaseholds, which were expressly provided for by the testator, cannot be held to pass under the residuary clause.

First point.

Second point.

Cleasby, in reply.—It appears to be conceded on the other side, that, if Mary Skilbeck took any interest in the leaseholds beyond a mere life estate, such interest would

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constitute assets in the hands of her representative, and therefore judgment must be for the plaintiff. That there may now be as many executory devises of a term of years as of a real estate, is beyond doubt. In Fearn's Cont. Rem. 401, is the following passage—"The third sort of executory devises, comprising all that relates to chattels, is, where a term for years, or any personal estate, is devised (more properly bequeathed) to one for life, or otherwise; and, after the decease of the devisee or legatee for life, or some other contingency or period, is given over to somebody else. Such ulterior limitation was void at common law, and the whole property vested in the person to whom it was limited for life:" and after citing *Manning's* case, 8 Rep. 95, *Lampett's* case, 10 Rep. 46, and other authorities, the learned author adds, p. 404—"The cases I have adduced are sufficient to shew the law to be now settled, that limitations over of chattels real, after a devise to one for life, are good as executory devises."—The charge is imposed on the estate itself, not on the devisees.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court: The decision of the court in this case will turn upon the single point whether Mary Skilbeck took any interest in the leasehold property bequeathed by the will of Edward Hepworth, beyond a life estate: for, it has been properly admitted in the course of the argument, that, if she took more than a life estate, the leasehold will be assets in the hands of the administrator, and the judgment must be for the plaintiff. We are of opinion, that, under the will of Edward Hepworth, Mary Skilbeck took an express estate for life, with a remainder to her two eldest sons, Edward and Matthias for their lives, as tenants in common, with the ultimate remainder in the term, on certain contingencies, to herself; and that, consequently, upon the death of Matthias, his mother Mary Skilbeck became absolutely entitled to his moiety, for the remainder

of the term. The real question is, whether the express devise for life to the two eldest sons is enlarged by the words which follow into an estate tail; for, if such is the case, it must be admitted that they would take the whole interests in the leaseholds, and that any remainder over would be void. The words upon which that question has turned are these, viz. "But, in case my said daughter Mary shall not have a son or sons to attain the age of twenty-one years, *and such sons dying without lawful issue*, then I give and bequeath the same to her daughter or daughters: but, in case my said daughter should happen to die without lawful issue," then the testator devises it over. And we think it clear that these words do not import a giving over of the leasehold upon the general failure of issue of the two sons, which would be an estate tail, but a dying without issue under twenty-one; so that the event upon which the leasehold is given over must happen within a period which can create no danger of a perpetuity. The cases cited on the part of the plaintiff, and many of which are to be found collected in *Fearne on Contingent Remainders*, pp. 470 et seq., are sufficient authority to that point. In the event, therefore, which has actually happened, of Matthias dying without children, his moiety in the term came to his mother, either under the devise over in case of the general failure of issue in her, or, at all events, under the residuary clause of the will. As to the argument, that, by reason of the charges contained in the will of certain sums to be paid to the younger children, the tenants for life must be presumed to take the whole interest, the answer has been properly given, that the charge is not imposed on the tenants for life, but on the property itself. We think therefore there must be judgment for the plaintiff.

Judgment for the plaintiff.

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The distinction between that part of the law of the foreign country where a personal contract is made, which is adopted, and that which is not adopted by our courts, is—that so much of the law as affects the rights and merits of the contract, all that relates *ad decisionem litis*, is adopted from the foreign country—so much of the law as affects the remedy only, all that relates *ad litem ordinationem*, is taken from the *lex fori* of that country where the action is brought. In the interpretation of this rule, the time of limitation of the action is governed by the law of the country where the action is brought, and not by the *lex loci contractus*.

By the 189th article of the Code de Commerce, it is declared that “all actions relative to letters of exchange and to bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, are prescribed (so prescript) by five years—if the debt has not been acknowledged by an ‘*acte séparé*’: nevertheless the supposed debtors shall be held, if required, to affirm upon oath that they are no longer indebted; and their widows, heirs, or representatives, that they bona fide believe that there is nothing more due:”—Held—first, that this prescription merely operates in bar of the remedy, and not as an extinguishment of the right or contract itself—secondly, that a special plea setting up this prescription as an absolute bar, without qualification, was bad, the article containing an exception, that the debt is not “acknowledged by an *acte séparé*.”

CONRAD HUBER v. FREDERICK STEINER.

THIS was an action of assumpsit upon a promissory note made by the defendant, at Mulhausen in Switzerland, on the 12th May, 1818, of which the following is a translated copy:—

“On the 10th May, 1817, I promise to pay to the order of M. Conrad Huber the sum of 5800 livres tournois [237*l.* 9*s.*], value in account.

“F. Steiner.”

“Payable at the domicile of

“Messrs. Steiner, Brothers, at Strasbourg.”

The declaration was dated the 25th October, 1833. The defendant pleaded—first, the general issue—secondly, that the supposed causes of action in the declaration mentioned did not nor did any or either of them accrue to the plaintiff at any time within six years next before the commencement of the suit—thirdly, that, at the time of making the note, the plaintiff and defendant were merchants and traders domiciled and living and carrying on business in a foreign country, that is to say, the kingdom of France, and subject to the laws of France; that the note was made and delivered within the said kingdom of France by the defendant to the plaintiff, they then respectively being subjects of France and traders as aforesaid; and that, by the law of France then and continually from thence and now subsisting, all actions upon the said promissory note are and were wholly barred, precluded, and estopped after five years from the date of the protest on the said note; that five years from the date of the said protest had long elapsed before the commence-

ment of the suit—fourthly, that theretofore and at the time of the making of the said promissory note, the plaintiff and defendant were merchants and traders domiciled and living and carrying on business in a foreign country, that is to say, the kingdom of France, and were subjects of France, and subject to the laws of France; that the said promissory note was made and delivered within the said kingdom of France by the defendant to the plaintiff, they then respectively being such subjects of France and traders as aforesaid; that by the law of France then (that is to say, at the time of making the said promissory note) and continually from thence and now subsisting, all actions upon the said promissory note are and were wholly barred, precluded, and estopped after five years from the date of the protest thereon:—provided, nevertheless, that the alleged debtor is compellable, if so required, to make oath that he is no longer indebted; that five years from the date of the protest of the said promissory note had long elapsed before the commencement of the suit; and that he was then ready and willing, and had been ready and willing from the expiration of the said term of five years, and thereby offered, if thereunto required, to make oath that he was not indebted upon the said promissory note.

To the second plea, the plaintiff replied, that he, the plaintiff, at the time when the said causes of action in the declaration mentioned did accrue to the plaintiff, was in parts beyond the seas, to wit, at Diesenhofen, in the canton of Thurgau, in Switzerland; and that the plaintiff, ever since the accruing of the said causes of action in the declaration mentioned, had been and still was in parts beyond the seas out of this kingdom: and, to the third and fourth, that, by the law of France, at the time of making the said promissory note, and continually from thence and now subsisting, all actions upon the said promissory note are not and were not wholly barred, precluded, and estopped

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after five years from the date of the protest on the said promissory note, in manner and form as the defendant had in those pleas respectively alleged.

Rejoinder to the replication to the second plea—that the plaintiff after the accruing of the cause of action, and more than six years before the commencement of this suit, to wit, on the 1st May, 1827, came from beyond the seas, and was in this kingdom, to wit, at London aforesaid.

The cause was tried before Vaughan, J., at the Sittings in London after Easter Term, 1834. Mulhausen is in the kingdom of France. The note declared on was given in pursuance of an agreement between the plaintiff and defendant in which the parties were described as Conrad Huber of Diesenhofen in Switzerland, beneficial heir (a) of the late John Huber, his brother, and having power of attorney from his co-heirs, and Frederick Steiner formerly a partner in the house of Huber, Steiner, & Wild, of Mulhausen. In this agreement, two promissory notes, the aggregate amount of which was equal to the amount of the note in question, were stated to have been given by the defendant to the plaintiff in full liquidation of all the plaintiff's claims both upon the defendant and upon the firm of Huber, Steiner, & Wild, of Mulhausen. By a memorandum added to this agreement, the promissory note in question is stated to be substituted for the two notes mentioned therein. The note was dishonoured, and protested on the 12th May, 1817. The handwriting of the defendant to the promissory note, agreement, and memorandum, was admitted; as also to two letters from the defendant to the plaintiff, both of which were directed to

(a) According to the law of France, persons claiming as beneficiary heirs assume no responsibilities and are entitled to no rights, but take only what surplus may remain after the credi-

tors and legatees of the deceased shall have been all paid. See the Code Civil, Liv. 3, Tit. 1, ch. 5, s. 3—"Du Bénéfice d'inventaire, de ses effets, et des obligations de l'Héritier bénéficiaire."

Mr. C. Huber, Diesenhofen, Switzerland, and of which the following are translations:—

“Accrington, near Blackburn,

“9th November, 1827.

“I have received your letter of the 19th September last. In reply to which I have to say that my brother Charles at Rebeemzike has my full powers of attorney to act in my name in anything relative to my old concerns in France. As our stipulations are dated of Mulhausen, the place in which the establishment did exist, that will be the place where all the differences are to be decided, if an amicable arrangement cannot be made between us. If it is agreeable (in order to come to a settlement), you may appoint a meeting to my brother Charles at Mulhausen, or in any other place you may like, for the purpose of conferring with him on the subject; and I am sure he will accede to anything that is reasonable, in order to prevent the expense which a lawsuit will occasion. I would not say anything hard against you for your conduct and that of your brother towards me. However, I must observe to you that you did not deliver your candern account, and that you did not account for the deficiency in the drugs which there appears to be by the books, as well as respecting the drugs received, used, and left, and the articles furnished by yourself. I have besides been obliged to buy the claims of Wild, including those of Belvis, as well as those of my brothers, to whom I have been under the necessity of making cession of my share of inheritance which may at some future time be coming to me from my parents. If all these should be carried to my credit in account, your claims will come to nothing. In the meantime, I am writing to my brother Charles by this post, requesting him to have an interview with you, if agreeable.”

“Accrington, near Blackburn,

“1st September, 1828.

“I have received your letter, by which I observe that

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an arrangement with you could not be effected. It seems that you think that the payment of the bills on Strasbourg, and protested, cannot be contested. Nobody can hinder you from thinking so; but, as for me, I think otherwise. Those bills were given to you under an idea of there existing a claim by you upon me: but, if you stand in the light of a joint heir, I shall on my part have claims against you. For the rest, you are perfectly welcome to take any public proceedings. You may cause some expense to me; and I can put you to a greater one; and, when these have once commenced, I shall suspend all arrangement. I shall to-day write for the last time to my brother Charles upon this subject, and request him to have an interview with you in order to come to some arrangement with you if you will be reasonable; otherwise, I must beg of you not to write me any more letters, and to commence your proceedings."

The admissions also stated that the defendant came to England in 1814, and that he then went to or near Manchester, where he has resided ever since. On the part of the plaintiff, it was contended, that, inasmuch as the note was not payable until the 10th May, 1817, and the defendant came to this country in 1814, and had resided here ever since, the case must rest upon the law of this country — *Williams v. Jones*, 13 East, 439; *The British Linen Company v. Drummond*, 10 B. & C. 903: that the second plea was out of the question, no evidence having been given to support it; that the third and fourth were wholly irrelevant, they not asserting that the note was avoided by the law of France, but merely that the action was barred and precluded—applying to an action in the French courts; and that the 189th article of the Code de Commerce (upon which the defendant mainly relied) must mean to apply to merchants or traders domiciled in France at the time the cause of action arises.

On the part of the defendant the section above referred to was read—"Toutes actions relatives aux lettres de

change, et à ceux des billets à ordre souscrits par des négocians, marchands, ou banquiers, ou pour faits de commerce, *se prescrivent par cinq ans*, à compter du jour du protêt, ou de la dernière poursuite juridique, s'il n'y a eu condamnation, ou si la dette n'a été reconnue par acte séparé. Néanmoins les prétendus débiteurs seront tenus, s'ils en sont requis, d'affirmer, sous serment, qu'ils ne sont plus redevables; et leurs veuves, héritiers, ou ayans-cause, qu'ils estiment de bonne foi qu'il n'est plus rien dû." In order to explain the nature and effect of this prescription, M. Colin, a French advocate, was called by the defendant. On his examination in chief, he stated, that, by article 1234 (b) of the Code Civil, prescription was one mode of *extinguishing* obligations; and that promissory notes are *extinguished* after five years from the date of the protest. In his cross-examination, he stated that prescription was by the French law merely a *presumption of payment*, and, if it can be shewn that the debt is not paid, the prescription does not run against it: he also authenticated two decisions of the French Supreme Court, referred to in Paillet's Manuel de Droit Francois, of which the following are translations:—"Prescription cannot be invoked against a bill of exchange when it is admitted that it has not been paid."—"Prescription is a legal presumption of payment in this sense only, viz. that it may be destroyed by proof to the contrary." On his re-examination, he further stated that a promissory note was not a contract within the meaning of that word in article 1101 (c) of the Code Civil; that a contract or an act is settled by a particular

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(b) "Les obligations s'éteignent par le paiement, par la novation, par la remise volontaire, par la compensation, par la confusion, par la perte de la chose, par la nullité ou la rescision, par l'effet de la condition résolutoire, qui a été expliquée au chapitre précédent, et par la *prescription*,

qui fera l'objet d'un titre particulier."

(c) "Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent envers une ou plusieurs autres, à donner, à faire, ou à ne pas faire quelque chose."

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law of the Code Civil (art. 2262), and enjoys thirty years' prescription; that bills of exchange and promissory notes are regulated by another particular law—for instance, a bill of exchange is prescribed by five years; if acknowledged by an act, then it is thirty years: that an act is a mutual acknowledgment signed by both parties; and that the term “acte séparé” requires a note signed by the debtor.

Evidence re-
 jected.

In the course of the cross-examination of the witness Colin, the counsel for the plaintiff put into his hands the letter dated the 1st September, 1828, and proposed to ask him whether that letter was by the French law such an act or acknowledgement as would prevent the application of the French law of prescription, or whether the letter would by the French law prevent the prescription from applying to the note in question. The learned judge thought the answers to these questions would not be evidence, and therefore would not allow them to be put.

It was further contended on the part of the defendant, that, supposing the third and fourth pleas not to be sustainable, yet, inasmuch as the defence set up consisted of an entire discharge or destruction of the cause of action, it might be proved under the general issue.

The learned judge left it to the jury to say whether or not the plaintiff was domiciled in France at the time the note was given—reserving for the consideration of the court the question as to the effect of the French law of prescription. The jury found that the plaintiff was domiciled in France at the time the note was given. The verdict was entered for the plaintiff on the first and second pleas, and for the defendant on the third and fourth.

Taddy, Serjeant, in Trinity Term, 1834, in pursuance of the leave reserved, obtained a rule nisi to enter a verdict for the plaintiff for 237l. 9s., or to enter judgment non obstante veredicto on the third and fourth pleas, on the ground that the French law of prescription did not annul the *debt*, but only operated in bar of the *remedy* in the

French courts of law—citing Huberus, *De Conflictu Legum*, s. 7; *Williams v. Jones*, 13 East, 450; *The British Linen Company v. Drummond*, 10 B. & C. 903; *De La Vega v. Vianna*, 1 B. & Ad. 286.

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Bompas, Serjeant, and *Martin*, in Easter Term, shewed cause.—The main question to be considered in this case is, whether, by the law of France, *the contract* made by the defendant in his promissory note *is altogether extinguished* and made void in that country, by reason of the doctrine of prescription that prevails in the French law, or whether *the remedy only is barred* in the French courts of law, as in the case of the English statute of limitations; for, where the foreign law of prescription merely bars the remedy, the time and mode of bringing the action is governed by the law of the country where the action is brought—"Ratio hæc est, quod præscriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ"—Huberus, *Prælectiones Juris Civilis*, part 2, lib. 1, tit. 3, *De Conflictu Legum*, s. 7. Dr. Story, in his *Commentaries on the Conflict of Laws*, § 576, says: "In regard to statutes of limitation or prescription, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits. They go ad litis ordinationem, and not ad litis decisionem, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the courts of a state, whether they be brought by subjects or by foreigners. And there can be no reason, and no sound policy, in allowing higher or more extensive privileges to foreigners than to subjects. Laws thus limiting suits are founded in the noblest policy; they are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs from the ambiguity and obscurity of transactions. They presume that claims *are extinguished*, because they are not litigated within the prescribed

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period. They take away all solid grounds of complaint, because they rest on the negligence or laches of the party himself. They quicken diligence, by making it in some measure equivalent to right. They discourage litigation, by burying in one common receptacle all the accumulations of past times, which are unexplained, and have now become inexplicable. It has been said by Voet, with singular felicity, that controversies are limited, lest they should be immortal, while men are mortal—*ne autem lites immortales essent, dum litigantes mortales sint.*” Voet. ad Pand. Lib. 5, tit. 1, § 53, p. 328. Again the same learned commentator says, § 582—“ But, although statutes of limitation or prescription of the place where a suit is brought, may properly be held to govern the rights of parties in such suits, or, as the proposition is commonly stated, the recovery must be sought and the remedy pursued within the times prescribed by the *lex fori*, without regard to the *lex loci contractûs*, or the origin of the cause; yet there is a distinction which deserves consideration, and which has been often propounded. It is this. Suppose the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself *ipso facto*, and declare it a nullity after the lapse of the prescribed period, in such case the statute may be set up in any other country to which the parties remove, by way of extinguishment.” By the 189th article of the Code de Commerce, it is declared that—“ Toutes actions relatives aux lettres de change, et à ceux des billets à ordre souscrits par des négocians, marchands, ou banquiers, ou pour faits de commerce, se prescrivent par cinq ans, à compter du jour du protêt, ou de la dernière poursuite juridique, s'ils n'y a eu condamnation, ou si la dette n'a été reconnue par acte séparé. Néanmoins les prétendus débiteurs seront tenus, s'ils en sont requis, d'affirmer, sous serment, qu'ils ne sont plus redevables; et leurs veuves, héritiers, ou ayans-cause, qu'ils estiment de bonne foi qu'il n'est plus

rien dû." Upon this a question arises as to what is meant by the words "se prescrivent:" and, in order to the right understanding of this, recourse must be had to the Code Civil, which contains general provisions in some degree regulating all the subsequent codes. Article 1107 of that code provides that "Les contrats, soit qu'ils aient une dénomination propre, soit qu'ils n'en aient pas, sont soumis à des règles générales, qui sont l'objet du présent titre. Les règles particulières à certains contrats sont établies sous les titres relatifs à chacun d'eux, et les règles particulières aux transactions commerciales sont établis par les lois relatives au commerce." By article 2219, prescription is defined thus: "La prescription est un moyen d'acquiescer ou de se libérer par un certain laps de temps, et sous les conditions déterminées par la loi." "Les obligations s'éteignent par le paiement, par la novation, par la remise volontaire, par la compensation, par la confusion, par la perte de la chose, par la nullité ou la rescision, par l'effet de la condition résolutoire (qui a été expliquée au chapitre précédent), et par la prescription, qui fera l'objet d'un titre particulier"—art. 1234. That a promissory note is an *obligation*, within the meaning of that article, appears from art. 1101—"Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent envers une ou plusieurs autres, à donner, à faire, ou à ne pas faire quelque chose." A promissory note is undoubtedly an agreement, by which one person binds himself to another to give or to do something. It will be contended on the other side that prescription is but a presumption of payment, susceptible of being negated by contrary proof. Articles 1350 and 1352 of the Code Civil give the definition of a legal presumption—"La présomption légale est celle qui est attachée par une loi spéciale à certains actes ou à certains faits: tels sont—1°. Les actes que la loi déclare nuls, comme présumés faits en fraude de ses dispositions, d'après leur seule qualité—2°. Les cas dans lesquels

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la loi déclare la propriété ou la libération résulter de certaines circonstances déterminées—3°. L'autorité que la loi attribue à la chose jugée—4°. La force que la loi attache à l'aveu de la partie ou à son serment." "La présomption légale dispense de toute preuve celui au profit duquel elle existe. Nulle preuve n'est admise contre la présomption de la loi; lorsque, sur le fondement de cette présomption, elle annule certains actes ou dénie l'action en justice, à moins qu'elle n'ait réservé la preuve contraire, et sauf ce qui sera dit sur le serment et l'aveu judiciaires." These several provisions tend to shew, that, where the time of prescription has been suffered to elapse, the debt or cause of action is ipso facto extinguished. The law of England, in cases of foreign contracts, recognizes and construes the contract according to the law of the country in which it is made: whatever operates there as a discharge or extinguishment of the debt, equally enures as an extinguishment here—*Burrows v. Jemimo*, 2 Str. 733; *Lord Lovat v. Forbes*, Morrison's Dict. of Decis. 4512; *Delvalle v. The York Buildings Company*, Ib. 4525; *York Buildings Company v. Cheswell*, Ib. 4528; *Ballantine v. Golding*, cited in *Smith v. Buchanan*, 1 East, 10; *Inglis v. Usherwood*, 1 East, 515; *Imlay v. Ellefsen*, 2 East, 455; *Potter v. Brown*, 5 East, 124; *Williams v. Jones*, 13 East, 439; *Talleyrand v. Boulanger*, 3 Ves. 447; Per Heath, J., in *Melan v. The Duke de Fitzjames*, 1 B. & P. 138; *British Linen Company v. Drummond*, 10 B. & C. 903; *De La Vega v. Vianna*, 1 B. & Ad. 284; *Allivon v. Furnival*, 1 C. M. & R. 277. In *Trimbey v. Vignier*, 4 M. & Scott, 695, 1 New Cases, 151, Tindal, C. J., says: "The rule that applies to the case of contracts made in one country and put in suit in the courts of law of another country, appears to be this; that the interpretation of the contract must be governed by the law of the country where the contract was made—*lex loci contractus*: the mode of suing, and the time within which the action must be brought, must be go-

verned by the law of the country where the action is brought—in ordinandis judiciis, loci consuetudo ubi agitur.” But, as that was not the point in judgment in that case, the question must still be deemed open to argument. [*Tindal*, C.J., assented.]

The circumstance of the defendant being resident in England at the time the note became due, may be relied upon on the other side as preventing the operation of the French law of prescription. By article 2251 of the Code Civil, it is declared—“*La prescription court contre toutes personnes, à moins qu’elles ne soient dans quelque exception établie par une loi.*” The English statute of limitations contains an exception in favour of parties out of the kingdom. The French law, however, recognizes no such exception. The note being made in France when all the parties were subject to the law of that country, the prescription that obtains there must be taken to form part of the contract between them: it is the same as if the five years’ prescription had been inserted as a condition on the face of the note itself.

Another point that will be urged on the part of the plaintiff is, that the third and fourth pleas set up the French law of prescription as an absolute bar, without any exception or qualification; whereas the 189th article of the Code de Commerce, upon which those pleas are founded, contains an exception—“*si la dette n’a été reconnue par acte séparé.*” Undoubtedly, where the subject matter of the pleading is a penal law, all exceptions must be negatived. But here the exception is similar to the exception in the English statute of limitations (21 Jac. 1, c. 16, s. 4), and that exception it has never been held necessary to notice in pleading. If the plaintiff wished to avail himself of the exception, he should have replied it. Besides, if the French law of prescription operates an absolute extinction of the debt, and not a mere bar of the remedy, it may be given in evidence under the general issue.

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As to the rejection of evidence.

As to the rejection of evidence—The letter of the 1st September, 1828, being put into the hands of the witness Colin, it was proposed to ask him whether that letter was by the French law such an act or acknowledgment as would prevent the application of the French law of prescription, or whether the letter would by the French law prevent the prescription from applying to the note in question. The learned judge refused to allow these questions to be put: he admitted the advocate's opinion upon the law of France, but declined to receive his application of it to the particular letter. In this the learned judge was warranted by the authorities—*Chapman v. Walton*, 10 Bing. 57, 3 M. & Scott, 389; *Campbell v. Rickards*, 2 N. & M. 542, 5 B. & Ad. 840: which latter case expressly over-ruled *Rickards v. Murdock*, 10 B. & C. 527, which seems to bear a different aspect.

As to what is a sufficient acknowledgment or "acte séparé" to prevent the application of the French law of prescription.

What is meant by an "acte séparé," in article 189 of the Code de Commerce, seems to be explained by article 2248 of the Code Civil—"La prescription est interrompue par la reconnaissance que le débiteur ou le possesseur fait *du droit* de celui contre lequel il prescrivait." Upon the construction of our statute of limitations, an opinion for a long time prevailed that any acknowledgment that the debt was unpaid, took the case out of the operation of the act: the cases of *A'Court v. Cross*, 3 Bing. 329, 11 Moore, 198, *Scales v. Jacob*, 3 Bing. 638, 11 Moore, 553, and *Tanner v. Smart*, 6 B. & C. 603, 9 D. & R. 549, finally settled the point. The 2248th article of the Code Civil would seem to have been framed to obviate this doubt upon the English statute: a bare acknowledgment of the debt will not suffice; it must be a "reconnaissance du droit" of the creditor. The use of the term "interrupt" shews that the prescription must be in course at the time it is "interrupted" by an acknowledgment of right: whereas, here, the letters, if even they amount to an acknowledgment of the existence of a debt (and they clearly contain anything

but a reconnaissance du droit of the plaintiff), were not written until long after the lapse of the period of prescription.

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Taddy and Spankie, Serjeants, and Cleasby, for the plaintiff.—The third and fourth pleas setting up the French of law prescription as an absolute bar, are not supported by the 189th article of the Code de Commerce, which contains an important exception—"si la dette n'a été reconnue par acte séparé." Com. Dig. *Pleader*, (C. 81.); *Hotham v. The East India Company*, 1 T. R. 638, 644; *Thursby v. Plant*, 1 Wms. Saund. 234, n. [c]. Lord Tenterden thus lays down the rule in *Vavasour v. Ormrod*, 6 B. & C. 430, 9 D. & R. 597: "If an act of parliament or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But, if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it with the exception; and, if he state it as containing an absolute unconditional stipulation, without noticing the exception, it will be a variance."

The questions proposed to be put to the witness Colin ought to have been allowed. If contracts are to be construed according to the *lex loci contractûs*, it would seem to follow that the *lex loci* and its received construction are mere matters of fact ascertainable only by oral testimony.

The principal questions in this case, however, are—first, whether the limitation of time within which the plaintiff was bound to bring his action, is governed by the law of France, the place where the contract was made, and

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where both the contracting parties were at the time domiciled, or by the law of the country in which the remedy is sought to be enforced—secondly, whether the French law of prescription operates as an absolute extinguishment of the contract itself, or only as a bar of the remedy in the French courts of law.

1. Time of limitation of action, how governed.

1. The universally received doctrine in all the states of Europe is, that the law of the place where the contract is made, governs in all but the *tempus et modum actionis instituendæ*, which are regulated by the law of that country where the action is brought. Huber, in his *Prælectiones Juris Civilis*, part 2, lib. 1, tit. 3 (*De Conflictu Legum*), s. 7, says: “*Præterea dubitatum est, si ex contractu alibi celebrato, apud nos actio instituat, atque in ista actione danda vel neganda, aliud juris apud nos, aliud esset ubi contractus erat initus, utrius loci jus servandum foret? Exemplum: Frisius in Hollandia debitor factus ex causa mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit præscriptionem apud nos in ejusmodi debitis receptam; creditor replicat in Hollandia ubi contractus initus erat ejusmodi præscriptionem non esse receptam, proinde sibi non obstat in hac causa. Sed aliter judicatum est, semel in causa Justi Blenkenfeldt contra G. Y., iterum inter Johanaem Jonellin Sartorem Principis Aaransonensis contra N. B. utraque ante magnas ferias 1680. Eadem ratione, si quis debitorem in Frisia conveniat ex instrumento coram Scabinis in Hollandia celebrato, quod ibi, non jure communi, habet paratam executionem, id heic eam vim non habebit, sed opus erit causæ cognitione et sententia. Ratio hæc est, quod *præscriptio et executio non pertinent ad valorum contractus, sed ad tempus et modum actionis instituendæ*, quæ per se quasi contractum separatimque negotium constituit, adeoque receptum est optima ratione, ut *in ordinandis judiciis loci consuetudo ubi agitur*, etsi de negotio alibi celebrato, spectetur, ut docet Sandius, lib. i, tit. xii, def. 5, ubi tra-*

dit, etiam in executione sententiæ alibi latæ, servari jus loci in quo fit executio, non ubi res judicata est." " Si præscriptioni implendæ alia præfinita sint tempora in loco domicilii actoris, alia in loco ubi reus domicilium foret, spectandum videtur tempus, quod obtinet ex statuto loci, in quoreus commoratur"—Voet. Lib. xlv, tit. iii, s. 12. In *The York Buildings Company v. Cheswell*, Morrison's Dict. of Decis. 4528, where it was held that the Scottish prescription was not pleadable by debtors domiciled in England, the court of session say: " This is in all respects an English company domiciled in England, and by their charter of erection fixed down to a residence there; so that, in every instance of their being sued in this country, citation at the pier and shore of Leith was necessary. If, instead of being thus permanent in England, they had changed their place of residence to Scotland, and continued there during the forty years, it might have been competent to them to plead our prescription, notwithstanding that England was the locus contractus. For, it is the lex domicilii debitoris which in this matter is the governing rule; and that law admits not this prescription. It is clear, that, in England, actions on these bonds would lie against the company. They are not, therefore, in the words of the statute of 1469, ' obligations of nane avail.' The debtors surely would not be entitled to say so for having brought their effects over the border. In all cases in which the court has sustained our prescriptions against English debts, the debtors were considered as having acquired a residence in this country." The only exception or distinction to be found, is that suggested by Dr. Story—" Where the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself ipso facto, and declare it a nullity after the lapse of the prescribed period, in such case the statute may be set up in any other country to which the parties remove, by way of extinguishment:" with this qualification—"that

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the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case." The present case well illustrates the propriety and necessity of this rule. The note upon which the action is brought became due in 1817. In 1814, both the maker and the payee had quitted the country in which the contract was made; and neither of them has ever returned thither: consequently, there never was a period at which the *lex loci contractus* was capable of being enforced. In *Williams v. Jones*, 13 East, 439, it was held, that, though the cause of action accrued within the jurisdiction of the Supreme Court at Calcutta, while both the parties were resident there; and by the king's charter, granted in pursuance of the 13 Geo. 3, c. 63, that court is authorized to exercise the same jurisdiction in civil cases as is exercised by the court of King's Bench within England by the common law thereof: and assuming that by such authority the provisions of the statutes of limitation 21 Jac. 16, c. 1, s. 7, and 4 Anne, c. 16, s. 19, are transferred to India as part of the law of England auxiliary to the common law: yet, by the express terms of the savings in those statutes, as applicable to the courts here, the plaintiff's right of action upon an *assumpsit* is saved, if he (having returned home before the defendant) commence such action within six years after the defendant's return home, though more than six years had elapsed in India after the cause of action accrued there, and during the defendant's stay within the jurisdiction of the court in that country. In the course of the argument, Lord Ellenborough, in reference to *Potter v. Brown*, 5 East, 124, puts this question—"Suppose those parties had contracted in a foreign country where the remedy was barred if not pursued within *three* years; and they had returned here after the three but before *six* years had elapsed; could the bar by the law of that country be pleaded to an action here?" And in his judgment he says: "Assuming that the charter

has given to those courts [in India] a jurisdiction analogous to that which is exercised by this court, and that they have adopted the statutes of limitations; still those statutes could only have the effect of barring the remedy in those courts in the cases provided for there: but they do not extinguish the right; for, if so, the remedy could not be revived by a subsequent promise. But, what is there to bar the remedy here, where the same law which is set up against him expressly saves the plaintiff's right of suit? It is said that parties who have contracted abroad return to this country with the same rights only which they had in the country where they so contracted; and, generally speaking, that is so; that is, if the *rights* of the contracting parties be extinguished by the foreign law upon the happening of certain events: but here there is only an extinction of the remedy in the foreign court, according to the law stated to be received there, but no extinction of the right: and there is no law or authority for saying, that, where there is an extinction of the remedy only in the foreign court, that shall operate by comity as an extinction of the remedy here also. If it go to an extinguishment of the right itself, the case may be different." In *Melan v. The Duke de Fitsjames*, 1 B. & P. 138, Heath, J., differing from the rest of the court, said: "In *constructing* contracts we must be governed by the laws of the country in which they are made; for, all contracts have a reference to such laws. But, when we come to remedies, it is another thing; they must be pursued by the means which the law points out where the party resides. The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it." This doctrine was recognized by the court of King's Bench in *De La Vega v. Vianna*, 10 B. & C. 284; and also in *The British Linen Company v. Drummond*, 10 B. & C. 903.

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bar of the remedy in the courts of law of that country, and not as an absolute extinguishment of the contract or debt itself. The 189th article of the Code de Commerce declares that—"Toutes *actions* relatives aux lettres de change, et à ceux des billets à ordre souscrits par des négocians, marchands, ou banquiers, ou pour faits de commerce, se prescrivent par cinq ans, à compter du jour du protêt, ou de la dernière poursuite juridique, s'il n'y a eu condamnation, ou si la dette n'a été reconnue par acte séparé. Néanmoins les prétendus débiteurs seront tenus, s'ils en sont requis, d'affirmer, sous serment, qu'ils ne sont plus redevables; et leurs veuves, héritiers, ou ayans-cause, qu'ils estiment de bonne foi qu'il n'est plus rien dû." The true construction of this article is, that the lapse of time is no more than a presumption of payment. This is so stated in Paillet's Manuel de Droit François, in the notes on the 189th article—"Prescription cannot be invoked against a bill of exchange when it is admitted that it has not been paid"—"Prescription is a legal presumption of payment in this sense only, viz. that it may be destroyed by proof to the contrary." The 189th article of the Code de Commerce appears to be copied from an ordonnance of Louis XIV, dated in 1673. Pothier, in his Traité du Contrat de Change, part 1, c. 6, art. 4, s. 197, treating of prescription as applicable to bills of exchange, says: "L'ordonnance de 1673, tit. 5, art. 21, a établi une prescription particulière à l'égard des lettres de change et billets de change. Elle porte: *Toutes lettres et billets de change seront réputés acquittés après cinq ans de cessation de demande et de poursuite, à compter du lendemain de l'échéance ou du protêt, ou de la dernière poursuite.* Il résulte de cet article une prescription contre les demandes que formeroit le propriétaire de la lettre de change, soit contre l'accepteur, soit contre le tireur, ou contre les endosseurs, après les cinq ans depuis l'échéance de la lettre, si elle n'a pas été protestée; ou depuis le protêt, s'il a été

fait, et qu'il n'ait pas été fait d'autres poursuites, ou depuis la dernière poursuite." Again, s. 203,—“ Cette prescription n'étant fondée que sur *une présomption de paiement*, il suit de-là que le propriétaire de la lettre, qui forme son action après le temps de la prescription, peut déférer le serment décisore au défendeur. C'est ce que décide l'ordonnance en l'article cité: il est dit — *Les prétendus débiteurs seront tenus d'affirmer, s'ils en sont requis, qu'ils ne sont plus redevables*: par exemple, si c'est l'accepteur qu'il a assigné, cet accepteur doit jurer qu'il a acquitté la dette; si c'est le tireur, le tireur doit jurer qu'il a remis les fonds.” To the same effect is s. 214, part 2, art. 1. In his *Traité des Obligations*, part 3, c. 8, “ Des fins de non recevoir, et prescriptions contre les créances,” art. 1, s. 676, he says: “ Les fins de non recevoir contre les créances, sont certaines causes qui empêchent le créancier d'être écouté en justice pour exiger sa créance.” “ Une seconde fin de non recevoir est celle qui résulte du serment décisore du débiteur qui a juré ne rien devoir, lorsque ce serment lui a été déféré par le créancier. Il résulte de ce serment une fin de non recevoir qui s'appelle *exceptio jurisjurandi*, qui rend le créancier non recevable à demander sa créance, quelque preuve qui soit survenue depuis.” S. 677—“ Une troisième fin de non recevoir est celle qui résulte du laps du temps auquel la loi a borné la durée de l'action qui naît de la créance. On appelle cette espèce de fin de non recevoir proprement *prescription*, quoique le terme de prescription soit un terme general, qui peut aussi convenir à toutes les autres fins de non recevoir.” “ Les fins de non recevoir *n'éteignent pas la créance*, mais ils la rendent inefficace, en rendant le créancier non recevable à intenter l'action qui en naît. Outre cela, quoique les fins de non recevoir n'éteignent pas *in rei veritate* la créance, néanmoins elles la font présumer éteinte et acquittée, tant que la fin de non recevoir subsiste. C'est pourquoi, lorsqu'il y a une fin de non recevoir acquise au débiteur con-

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tre ma créance, non-seulement je ne puis intenter action contre lui, je ne puis même lui opposer cette créance en compensation contre les créances qu'il auroit de sa part acquises contre moi depuis la fin de non recevoir acquise contra la mienne; car, la fin de non recevoir qui subsiste contre ma créance *opère une présomption de l'extinction de ma créance.*" "Les fins de non recevoir doivent être opposées par le débiteur; le juge ne les supplée pas." This position is further fortified by the language of the Code Civil, which in articles 2271, 2272, 2273, provides various terms of prescription or limitation in actions at the suit of "maîtres et instituteurs des sciences et arts, hôteliers, traiteurs," &c.; and by article 2275—"Néanmoins ceux auxquels ces prescriptions seront opposées, peuvent déférer le serment à ceux qui les opposent, sur la question de savoir si la chose a été réellement payée. Le serment pourra être déféré aux veuves et héritiers, ou aux tuteurs de ces derniers s'ils sont mineurs, pour qu'ils aient à déclarer s'ils ne savent pas que la chose soit due." If the prescription operated as a total extinguishment of the right, the law would not have provided for the tender of an oath to the debtor; and the proviso in article 189, as to an "acte séparé," would be nugatory. The equivocal expression in article 1234 of the Code Civil, upon which so much reliance has been placed, is satisfied by the "prescription trentenaire," which, it appears by articles 2262 and 2281, does operate a total annihilation or extinction of the right or claim.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court: The answer which the defendant has set up against this action is twofold—first, he relies upon the English statute of limitations—and secondly, upon the French law of prescription as stated in his third and fourth pleas. As the plea of the statute of limitations has been disposed of, by

reason that the replication of the plaintiff's being beyond sea from the time of the cause of action accruing, has been found in his favor, the only ground of defence which it will be necessary to consider will be that which arises from the plea of the French law.

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One objection made to the defendant's plea of prescription under the French law, is grounded upon the form in which it is pleaded. It is argued, that it is pleaded absolutely, and without any exception or qualification; whereas, according to the proof given at the trial, certain conditions and qualifications were attached to it. And we are of opinion that the objection taken to the form of those pleas ought to prevail. For, the law of the French prescription contained in section 189 of the Code de Commerce, upon which so much argument has taken place, embodies in it a most important exception which is not noticed in the plea; the exception, namely, "that the debt is not acknowledged by a separate and distinct act of the party charged, in writing." On this ground, we think the verdict which has been entered *pro formâ* for the defendant on those pleas, must be entered for the plaintiff.

As to the form
of the third and
fourth pleas.

As, however, the same matter of defence may be given in evidence under the general issue, it becomes necessary to consider the general question in the cause—whether, by the law of France, the contract made by the defendant in his promissory note is *altogether extinguished and made null and void in that country*, by reason of the doctrine of prescription which holds in the French law, or whether, under the doctrine of prescription, the contract itself is not annulled and extinguished, but *the remedy only barred* in the French courts of law: for, we take it to be clearly established and recognized as part of the law of England, by various decisions, that, if the prescription of the French law, which has been opposed to the plaintiff in the present case, is no more than a limitation of the time within which the action upon the note must be brought in the French courts, it will not

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prescription the
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form a bar to the right of action in our English courts; but that the question whether the action is brought within due and proper time, must be governed by the English statute. The distinction between that part of the law of the foreign country where a personal contract is made, which *is* adopted, and that which *is not* adopted by our English courts of law, is well known and established; viz. that so much of the law as affects the *rights* and *merit* of the contract, all that relates "ad litis decisionem," is adopted from the foreign country; so much of the law as affects the *remedy* only, all that relates "ad litis ordinationem," is taken from the "lex fori" of that country where the action is brought. And that, in the interpretation of this rule, the time of limitation of the action falls within the latter division, and is governed by the law of the country where the action is brought, and not by the *lex loci contractûs*, is evident from many authorities. In Huber's Treatise De Conflictu Legum, s. 7, he says: "Ratio hæc est, quod *præscriptio* (where observe the term 'præscriptio' is used generally for limitation) et executio non pertinent ad valorem contractûs, sed ad tempus et modum actionis instituendæ." It is unnecessary to cite more; the authorities are collected in the case of *The British Linen Company v. Drummond*, 10 B. & C. 903, which case itself furnishes an authority for the position.

Such being the general rule of law, a distinction has been sought to be ingrafted on it by the learned counsel for the defendant, that, "where the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself, ipso facto, and declare it a nullity after the lapse of the prescribed period; that, in such case the statute may be set up in any other country to which the parties remove, by way of extinguishment." This distinction is stated to be adopted from a work intitled "Commentaries on the Conflict of Laws," by Joseph Story, LL.D., p. 487: a work which it would be un-

just to mention without at the same time paying a tribute to the learning, acuteness, and accuracy of its author. And, undoubtedly, the distinction, when taken with the qualification annexed to it by the author himself, appears to be well founded. That qualification is, "that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case;" and, with such restriction, it does indeed appear but reasonable that the part of the *lex loci contractûs* which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded by the foreign country as the part of the *lex loci contractûs* which gives life to and regulates the construction of the contract: both parts go equally "*ad valorem contractûs*," both "*ad decisionem litis*." So much, however, being conceded to the defendant, it remains for him to set up and establish to the satisfaction of the court the proposition for which he contends, that the French law of prescription which applies to the present case is one which extinguishes not only the remedy, but the right or contract itself: for, unless it has this effect in France, the case falls within the larger and more general rule, that the time of limitation of the action must be governed by the law of the country where the action is brought.

Before, however, we come to the argument on this point, it may be expedient to advert to the facts of the present case, to which the rule of the French law is proposed to be applied. The action is brought on a promissory note made at Mulhausen, which at that time was subject to the law of France, where both the plaintiff and defendant may be taken to have been then domiciled. The promissory note was made and bore date on the 12th May, 1813, and payable to the order of the plaintiff on the 10th May, 1817. In the course of 1814, shortly after the making of the note, and more than three years before it became due, both parties quitted Mulhausen: the plaintiff going to Switzerland, the defendant coming to England, where he

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has ever since resided and been domiciled. Under such a state of facts, the defendant seeks to apply the 189th article of the Code de Commerce as a bar to the present action, on the ground that it operates as an annulling of the contract, an extinguishment of the claim and right of action in France. That article is found in the division of the Code de Commerce which relates to bills of exchange, and is contained in the following words: "Section 3. Of Prescription. All actions relative to letters of exchange and to bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, prescribe themselves [se prescrivent] by five years, reckoning from the day of protest, or from the last suing out any judicial process, if there hath been no judgment, or *if the debt hath not been acknowledged by any separate act*. Nevertheless, the pretended debtors shall be held, if required, to affirm upon oath that they are no longer indebted: and their widows, heirs, &c., that they bonâ fide believe there is no longer anything due." Now, the question is whether the defendant has made out affirmatively, to the satisfaction of the court, that this prescription has the necessary force of extinguishing and annulling the contract upon the note, ipso facto, after a lapse of five years from the time it becomes due: for, unless the prescription has this force, it operates on the remedy only, which, upon the general principle before laid down and acknowledged, will be governed by the *lex fori*, and not by the *lex loci contractûs*. And, after giving every attention to the authorities cited on both sides, we think the French law is not shewn to have the force contended for by the defendant. The defendant has brought together different passages in the Code de Commerce, and, by contrasting them with others which are found in the Code Civil, has shewn it *possible* that such may be the force and effect of the article in question. But he has produced no distinct authority that the contract is intended

to be annulled: whereas, on the contrary, the very terms of the article itself, the authority of text writers, and the reason of the thing, do so far outweigh, as it appears to us, the inference drawn from the comparison of different parts of the French law, that we cannot but hold that the section relied upon amounts only to a limitation of the remedy in the French courts to the space of five years, and not to an utter avoidance of the contract itself at the end of that period. The article itself begins by stating that "all *actions* prescribe themselves," not that the *contract* is prescribed or gone. The exception, that "the *action* is not prescribed if the debt is acknowledged by a separate writing;" the power given to the creditor to put the debtor to his oath that he owes nothing, called in the French law "*le serment décisoire* (*d*):" all these circumstances agree with the notion that it is the *action*, not the *debt*, which is prescribed by that law. Again, the text writers on the French law lay down the same rule distinctly. Without multiplying authorities, we refer to Pothier, *Traité des Obligations*, Part 3, c. 8—"Des Fins de non recevoir, et Prescriptions contre les Créances." In article 677, he explains prescription to be "the bar from the lapse of the time to which the law has limited the right of action arising out of the debt." And, still further, in the same section, where he states the effects of this species of bar, he says: "*Les fins de non recevoir n'éteignent pas la créance, mais ils la rendent inefficace, en rendant le créancier non recevable à intenter l'action qui en naît.*" Again: "Outre cela, quoique les fins de non recevoir n'éteignent pas in rei veritate la créance, néanmoins elles la font présumer éteinte et acquittée, tant que la fin de non recevoir subsiste." See Pothier also, in his treatise on the

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(d) "*Le serment judiciaire est de deux espèces: 1°. Celui qu'une partie défère à l'autre pour en faire dépendre le jugement de la cause: il est appelé décisoire—2°. Celui qui est déféré d'office par le juge à l'une ou à l'autre des parties.*" Code Civil, article 1357.

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"Contrât de Change, Part 1, c. 6, Art. 4—De la Præscription des Lettres de Change;" where it is laid down broadly by him in s. 203, that this prescription is founded only on presumption of payment. But, from the ground of reason and expediency, the inference is still more strong that the prescription limits the action only, and does not destroy the debt. For, if the debt itself is absolutely gone by reason of the lapse of five years, without any reference to the power of the plaintiff to sue in the mean time, what would be the condition of the creditor whose debtor quits the country where this law applies before the day of payment arrives—that is, before there is a possibility of maintaining the action—and never returns to it again? To maintain a position so contrary to reason, very strong authority must be expected: but none is shewn. On the contrary, the very text of the book from which the distinction is first taken (Story, p. 487), annexes to it the condition that the debtor and creditor have remained within the jurisdiction during the time of the prescription. In the case before us, *both* were absent: it would be enough, however, to say that *the debtor* was absent, to call in aid the maxim of the French no less than of the civil law—"Contrà non valentem agere, non currit præscriptio." We do therefore think that the law set up on the part of the defendant amounts to no more than a limitation of the time for bringing the action, not to an extinction of the contract; and that, consequently, it is no bar in itself under any circumstances—still less where the debtor ceased to reside in the country where the law prevails during the whole period of time that the debt was owing and due.

This conclusion makes it unnecessary to consider the objection urged on the part of the defendant to the evidence which was offered at the trial as to the effect of the acte séparé; as, in the judgment we have given, we place no reliance upon the letters of the defendant which give rise to that question.

We therefore think the verdict must be entered for the plaintiff upon the general issue, as well as upon the issues arising on the special pleas.

Verdict for the plaintiff.

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LESLIE and Others, Assignees of CUMBERLEGE, the
Younger, a Bankrupt, v. GUTHRIE.

THE defendant, on the 8th May, in Easter Term last, obtained judgment on demurrer to one of the pleas—vide ante, Vol 1, p. 683. On the 6th day of the present term—

Atcherley, Serjeant, for the defendant, obtained a rule calling upon the plaintiffs to shew cause why judgment as in case of a nonsuit should not be signed, the plaintiffs not having given notice of trial, and why the money paid into court in the cause should not be paid out to Messrs. Inglis & Co., the real defendants.

Bompas, Serjeant, shewed cause.—There has been no default: the plaintiff could not take any step pending the demurrer. One step in a term is sufficient. To entitle the defendant to move for judgment as in case of a nonsuit, no notice of trial having been given, there must be a term's default—*Butcher v. Kiernan*, 2 Marsh. 364. The plaintiffs have the whole of the present term to give notice.

Atcherley, Serjeant, in support of his rule.—When the trial is to be had in London, and notice is given for the sittings in term or for the first day of the sittings after term, it must be an eight or fourteen days' notice: but, if the notice be given for the adjournment day, it is sufficient to give such notice four days before the first day of the sittings after term, if the defendant reside within forty

Monday,
June 15th.

Where there were several pleas, on some of which issue was joined, and as to one a demurrer upon which judgment was given for the defendant four days before the end of Easter Term—The court refused to allow the defendant to sign judgment as in case of a nonsuit in Trinity Term, on the ground of the want of a notice of trial for the adjournment day of the sittings after Easter Term.

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miles from London—R. E. 51 Geo. 3. The step to be taken in order to prevent a judgment as in case of a nonsuit, must be a step touching the issue in fact. Here, the demurrer was disposed of on the 8th May: there was therefore ample time in the last term for the plaintiffs to give notice, the term not ending until the 13th.

TINDAL, C. J.—I do not think there has been such a default here as to warrant us in interfering, though *Paxton v. Popham*, 11 East, 366, is an authority to shew, that, after judgment for the defendant on demurrers to certain special pleas, there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues have been joined.

The rest of the court concurring—

Rule discharged, without costs.

Monday,
 June 15th.

COLLINS and Another v. GWYNNE.

Where a special case, on which judgment had been given for the plaintiff in this court, was at the instance of the defendant turned into a special verdict, that he might have an opportunity of obtaining the judgment of a court of error thereon, this court, after the lapse of two years, and after the costs of the trial and special case had been taxed and paid, refused to allow the plaintiff the costs thereby occasioned.

JUDGMENT having in Hilary Term, 1833, been signed for the plaintiffs on a special case, and the costs taxed and paid, the defendant obtained leave to turn the special case into a special verdict. The record was then removed by writ of error to the Exchequer Chamber, where the judgment of this court was affirmed, with costs.

Taddy, Serjeant, for the plaintiffs, obtained a rule calling upon the defendant to shew cause why the prothonotary should not tax the plaintiffs the costs of and occasioned by the turning the special case into a special verdict, entering on the roll the special verdict, and carrying the transcript into the court of error.

Bompas, Serjeant, shewed cause.—He contended, that, as to the costs occasioned by turning the special case into a special verdict, the application being made at so late a

period (two years having elapsed since those costs were incurred) the court ought not to entertain it; and that, with respect to the costs arising after the allocatur and before the record reached the court of error, they were never allowed in the court below.

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Taddy, Serjeant, in support of his rule.—The defendant having brought a writ of error returnable in parliament, the plaintiffs are compelled to complete the roll in this court: consequently, the costs prior to the transcript reaching the Exchequer Chamber are clearly costs occasioned by the writ of error, but such as could not be allowed on taxation there. Then, with respect to the costs occasioned by turning the special case into a special verdict, inasmuch as that was matter of favour accorded to the defendant, he ought to pay those costs.

TINDAL, C. J.—The costs which the plaintiffs claim by this motion may be divided into two classes—first, those occasioned by the application of the defendant to turn the special case into a special verdict—secondly, the costs of entering the special verdict upon the roll, which costs had not been incurred when the costs of the trial and of the special case had been incurred. With respect to the first set of costs, it was certainly a matter of favour to the defendant to allow the special case to be turned into a special verdict; and I do not say that we should not have compelled him to pay the costs occasioned thereby, had the plaintiffs asked for them at the time. But, after the lapse of two years, I think it would be a little hard to inflict those costs upon the defendant. As therefore this is an application to our discretion, I am not, under the circumstances, disposed to accede to it. With regard to the costs of entering the special verdict on the roll, and carrying the transcript into the Exchequer Chamber, they properly belong to the plaintiff below on the affirmance of

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the judgment, unless (and I am not quite clear that it is not so) they are included in the costs usually awarded on affirmance in parliament. The matter must therefore go back to the prothonotary, to reconsider as to the last-mentioned costs.

The rest of the court concurring—

Rule accordingly.

*Tuesday,
 June 16th.*

The service of the writ of summons in an action on a promissory note payable (without interest) on demand, is a sufficient demand to entitle the plaintiff to recover interest from the date of such service.

PIERCE v. FOTHERGILL.

ASSUMPSIT on a promissory note for 39*l.* 10*s.* made by the defendant and payable to the plaintiff (without any mention of interest) on demand. The note was dated the 1st August, 1833; the writ of summons was served on the 22nd March, 1834, no previous demand having been made; the declaration contained no count for interest. The cause was tried on the 20th May, 1835. It appeared at the trial before Tindal, C. J., at the sittings in London after the last term, that the consideration for the bill was money lent. A verdict having been found for the plaintiff for the amount of the note, with interest from the day of its date—

Heaton obtained a rule nisi to reduce the verdict by the whole or part of the interest.—He submitted, that, as the note contained no contract for interest, and there had been no demand prior to the commencement of the action, the plaintiff was not entitled to any interest, unless the service of the writ of summons should be held to be a demand, which he submitted it was not, inasmuch as by the uniformity of process act, 2 Will. 4, c. 39, and the rules founded thereon, the writ was now the commencement of the action.

Talfourd, Serjeant, and *Steer*, shewed cause.—The consideration for the note being money lent, the jury were warranted in giving interest in the shape of damages for the detention—*Nichol v. Thompson*, 1 Camp. 52, n.; *Calton v. Bragg*, 15 East, 223; *Bruce v. Hunter*, 3 Camp. 467; *Slack v. Lowell*, 3 Taunt. 157; *Harrison v. Allen*, 2 Bing. 4, 9 Moore 28 (a). The plaintiff was at all events entitled to interest from the service of the writ of summons, that being equivalent to a demand.

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Heaton, in support of his rule.—The latitat, it is true, was held equivalent to a demand; but that process was not (as the writ of summons now is) the commencement of the action.

PER CURIAM.—We think the plaintiff is entitled to interest from the date of the service of the writ of summons, which has precisely the same effect in this respect as the filing a latitat according to the old practice.

Rule absolute accordingly.

(a) See *Fruhling v. Schroder*, ante, p. 143.

LEONARD v. CHARLES SIMPSON, Executor of
STEPHEN SIMPSON, Deceased.

Wednesday,
June 17th.

THIS was an action of debt upon a judgment obtained in an action of covenant for arrears of an annuity, against the defendant as executor of Stephen Simpson, deceased, with a suggestion of a devastavit. The defendant pleaded

In debt upon a judgment by default against the defendant as executor, suggesting a devastavit, the plaintiff gave in evi-

dence the record in the original action, and a *testatum* *fi. fa.* thereon, with the sheriff's return that he had caused to be levied the costs *de bonis propriis* of the defendant, and that the defendant had no goods or chattels of the testator in his hands to be administered:—Held, that this was *prima facie* evidence of a devastavit.

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that he did not waste, convert, or dispose of to his own use any of the goods and chattels which were of the said Stephen Simpson at the time of his death, which had come to the hands of the defendant as executor as aforesaid to be administered, in manner and form as the plaintiff had alleged. The cause was tried before Vaughan, J., at the Sittings at Westminster after last Hilary Term. The only evidence to shew a devastavit was an office copy of the record in the action of covenant, (together with the *testatum* fi. fa., and return thereto) whence it appeared that the defendant had suffered judgment to go by default in that action, and that a writ of inquiry had issued into London (where the venue in the action was laid), to which the sheriffs returned that it was found that the plaintiff had sustained damages by means of the premises to 73*l.* 10*s.*, over and above his costs and charges by him about his suit in this behalf expended, and for those costs and charges to 20*s.* "Therefore," the record proceeded, "it is considered that the said T. B. Leonard do recover against the said C. Simpson as executor as aforesaid his damages aforesaid by the said inquisition above found, and also 20*l.* for his costs and charges by the justices here adjudged of increase to the said T. B. Leonard and with his assent; which said damages, costs, and charges in the whole amount to 94*l.* 10*s.*, to be levied of the goods and chattels which were of the said Stephen Simpson at the time of his death in the hands of the said C. Simpson, as executor as aforesaid, to be administered: and if he hath not so much thereof in his hands to be administered, then 21*l.*, parcel of the damages aforesaid, being for the costs and charges as aforesaid, to be levied of the proper goods and chattels of the said C. Simpson: and the said C. Simpson, in mercy, &c.

Judgment signed the 19th Dec. 1833.

"Afterwards, that is to say, on the 19th December, 1833, the plaintiff comes here into court, by his attorney aforesaid, and prays the writ of the said lord the king of fi. fa. to be directed to the *Sheriff* of London, commanding

him, that, of the goods and chattels of the said Stephen Simpson at the time of his death in the hands of the said C. Simpson, as executor as aforesaid, to be administered, he cause to be made the said damages, costs, and charges aforesaid, and if he has not so much thereof in his hands to be administered, then 2*l.*, parcel of the damages aforesaid, being for the cost and charges aforesaid, to be levied of the proper goods and chattels of the said C. Simpson; and it is granted to him, returnable before the justices of our lord the king immediately after the execution thereof: the same day is given to the plaintiff at the same place. At which day, before the said justices at Westminster, comes the plaintiff, by his attorney aforesaid; and the sheriff, to wit, *William Holland, sheriff of the city aforesaid*, thereupon returns to the said justices that the defendant hath no goods or chattels which were of the said Stephen Simpson at the time of his death in his hands to be administered, whereof he can cause to be made the said damages, costs, and charges, or any part thereof; and that he has not any of the proper goods or chattels of the said C. Simpson in his bailiwick, whereof he can cause to be made the said sum of 2*l.*, parcel of the damages, costs, and charges as aforesaid, or any part thereof: whereupon it is sufficiently testified before the said justices, that the said C. Simpson hath sufficient goods and chattels which were of the said Stephen Simpson at the time of his death in his hands as executor as aforesaid to be administered, in the city of Litchfield, whereof the sheriff of that city may cause to be levied the whole amount of the said damages, costs, and charges; and that the said C. Simpson hath sufficient of his own proper goods and chattels in the said city, whereof the said sheriff may cause to be levied the said sum of 2*l.*, parcel of the damages aforesaid: and thereupon he prays the writ of our said lord the king of *fi. fa.*, to be directed to the sheriff of the said city of Litchfield, commanding him, that, of the goods and chat-

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Award of *fi. fa.*
into London.

Return thereto
by the sheriff
of Litchfield.

Award of testa-
tum *fi. fa.* into
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tels which were of the said Stephen Simpson at the time of his death in the hands of the said C. Simpson, as executor, to be administered, he cause to be made the damages, costs, and charges aforesaid; and, if he the said C. Simpson had not so much thereof in his hands as executor as aforesaid to be administered, then that the said sum of 21*l.*, parcel of the said damages aforesaid, being for the costs and charges aforesaid, to be levied of the proper goods and chattels of the said C. Simpson; and it is granted to him, returnable before his majesty's justices immediately on the execution thereof; the same day is given to the said plaintiff at the same place: at which day, before the said justices at Westminster, comes the plaintiff by his attorney aforesaid, and our said sheriff, to wit, William Holland, sheriff of the city of Litchfield, thereupon returns to our said lord the king at Westminster aforesaid, that he hath caused to be levied of the proper goods and chattels of the said C. Simpson the sum of 21*l.*, which money he has paid to the plaintiff in satisfaction of the damages aforesaid, being the costs and charges aforesaid; and that the said C. Simpson hath no goods or chattels in his bailiwick which were of Stephen Simpson deceased at the time of his death in the hands of the said C. Simpson to be administered, whereof he can cause to be levied the residue of the damages in the said writ mentioned."

On the part of the defendant it was submitted that the above evidence was insufficient, for that the court must take judicial notice that there are two sheriffs of London, whereas by the record produced it appeared that the *fi. fa.* was directed to *one sheriff* only; that the return of the sheriff of Litchfield was not sufficient evidence of a *devastavit*, for, *non constat* but the defendant might have sufficient goods and chattels in London, where the judgment was obtained; and that the sheriff ought in express terms to have returned a *devastavit*, as in the case of *Erving v. Peters*, 3 T. R. 685.

A verdict was taken for the plaintiff for 73*l.* 10*s.* debt and 1*s.* damages, with leave to enter a nonsuit.

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Butt, in Easter Term, obtained a rule nisi.—He submitted, that, on the face of the record, there appeared to have been no regular award of a *fi. fa.* into London, or return thereto, and consequently that it was consistent with the return to the testatum *fi. fa.* that there were goods of the testator in London; and that, if this were held sufficient, an executor might always be fixed personally by the plaintiff's procuring a *fi. fa.* to be issued into a county in which he was aware that the testator had no goods. He further submitted that, assuming that there had been a regular *fi. fa.* and return, and a regular testatum *fi. fa.* and return (the judgment by default being merely an admission of assets), that would not be evidence of a *devastavit*. In *Erving v. Peters*, the evidence given was, the record of the judgment in the former action, a writ of *fi. fa.* into the place where the venue was laid, and the sheriff's return thereto of *nulla bona*, and that the defendant had sold, eloiigned, and wasted goods of the testator to the amount in value of the debt and damages: and Lord Kenyon reluctantly assented that that was sufficient to fix the defendant. "It strikes me," says his lordship, "as bearing extremely hard on the defendant; but, hard as it is, he must submit to the law of the land, the current of authorities being against him. I have endeavoured to make my reason coincide with those authorities, but I confess that to this moment I have met with nothing to convince my mind. It seems extraordinary that the judgment in the first action should not be a judgment *de bonis propriis*, if the executor be liable at all events." Here the evidence did not go so far. In *Rock v. Leighton*, 1 Salk. 310, Com. 87, 1 Ld. Raym. 589, where it was held that a judgment against an executor by confession or default is an admission of assets, and he is estopped to say the con-

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trary on a devastavit returned, there *was* a devastavit in fact. *Skelton v. Hawling*, 1 Wils. 258, was a decision the same way, on the authority of *Rock v. Leighton*. *Treil v. Edwards*, 6 Mod. 308, merely decided that an executor shall not be permitted to prove the want of assets after a judgment by default. *Wharton v. Richardson*, 2 Str. 1075, 1 Wils. 125, 1 Ld. Raym. 591, is to the same effect. Here the sheriff ought to have returned a devastavit, as was done in *Erving v. Peters*.

Cowling shewed cause.—The objections to the verdict in this case are two—first, that there appears to have been no award of a fi. fa. into London, where the venue in the original action was laid—secondly, that the sheriff has not returned a devastavit. Both these objections are founded upon the assumption that it was necessary for the plaintiff to prove a devastavit. That, however, is erroneous: it is enough to shew a judgment by default; the plaintiff has no means of knowing what has become of the assets. In Mr. Serjeant Williams's note to the case of *Wheatley v. Lane*, 1 Wms. Saund. 219 c. (8), the rule is thus stated: "This action may be brought upon the judgment, upon a bare suggestion of a devastavit, without any writ of fi. fa. first taken out upon the judgment; as was done in the case of *Wheatley v. Lane*, 1 Sid. 397. But the usual course is, first to sue out a fi. fa. upon the judgment, and, upon the sheriff's return of nulla bona, to bring the action and state the judgment, the writ, and return in the declaration, and, on the trial, the record of the judgment, the fi. fa., and the return, will be sufficient to prove the case—*Challoner v. Challoner*, cited in 1 Wils. 259, *Skelton v. Hawley*; 6 T. R. 685, *Erving v. Peters*. If the sheriff cannot find any assets, he may, if he pleases, return a devastavit, as well as nulla bona, to the writ of fieri facias de bonis testatoris, for, the fieri inquiry is only for his security—1 Salk. 310, 1 Ld. Raym. 590, *Rock v. Layton*, Com.

Rep. 87, S. C. And he seems to run no great risk by so doing; for, the judgment, and no assets to be found, will be sufficient evidence of a devastavit in an action against him for a false return—*Rock v. Leighton*, cited in 3 T. R. 692, and 1 Salk. 310, S. C." Since the case of *Glossop v. Pole*, 3 M. & S. 175—where it was held, that, in case against the sheriff for a false return of nulla bona, an inquisition taken by him to ascertain the property of the goods taken under the fi. fa., finding them to be the property of a third person, not the defendant in the execution, is not admissible evidence for the sheriff—it has never been usual to return a devastavit on a writ of fi. fa. *Hope v. Bague*, 3 East, 2, is precisely in point. There, the plaintiff had recovered judgment against a testator in his lifetime, and afterwards had judgment of execution against the executors in scire facias, upon which judgment he sued the executors in debt in the detinet, suggesting a devastavit; and it was held, that, the executors being fixed conclusively with assets by such latter judgment, the issue upon non detinet lay upon them to prove the due administration of such assets. The judgment of Lord Kenyon in *Farr v. Newman*, 4 T. R. 647, is a little at variance with the opinion expressed by him in *Erving v. Peters*. In *Blackmoor v. Mercer*, 2 Saund. 402 a., 1 Vent. 221, 3 Keb. 62, 1 Sid. 412, in an inquisition returned by the sheriff on a scire fieri inquiry, it was found that the executors had *sold, eloiigned, and converted and disposed to their own use* divers goods of the testator. The defendants pleaded that they had not sold, eloiigned, &c.; and the plaintiff replied that they had sold, eloiigned, &c., and tendered an issue. The words, "*sold, eloiigned, and to their own use converted, &c.*," were held to be sufficient, though it was not expressly found or alleged that the defendant had wasted the goods. These authorities conclusively shew, that, if the plaintiff was bound to prove a devastavit in this case, sufficient evidence was given by

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him for that purpose. The testatum fi. fa., even though irregular, is a perfectly good writ, till set aside.

Butt, in support of his rule.—The testatum into Litchfield undoubtedly must be considered unexceptionable in itself: but the irregularity complained of is, the want of a previous fi. fa. into London. *Skelton v. Hawley* and *Challoner v. Challoner* were decided upon the authority of *Rock v. Leighton*, where there was a return of devastavit, and which merely decides that a judgment against an executor by default or confession, is an admission of assets. *Treil v. Edwards* and *Wharton v. Richardson* carry the matter no further. In *Erving v. Peters* all the previous authorities were considered, and it was distinctly laid down, that, if an executor plead payment, and omit to plead plene administravit, and a verdict be given against him on such plea, it operates as an admission of assets in an action founded on such judgment suggesting a devastavit. There is no authority to warrant the court in going further on this occasion, and holding such a judgment to be an admission of a devastavit also; or that it amounts to an admission of assets in any place into which the plaintiff thinks fit to issue a testatum fi. fa. The plaintiff is bound to prove the issuing and return of the fi. fa., and to shew a devastavit in fact, or a return of devastavit by the sheriff.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court: The short point in this case is, whether such evidence of a devastavit was given at the trial on the part of the plaintiff, as, being unanswered by the defendant, entitles the plaintiff to a verdict: and we think the evidence was sufficient for that purpose. The judgment by default in the former action is conclusive upon the defendant that he has assets to satisfy the judgment. This is so thoroughly settled in

the case of *Rock v. Leighton*, and in other cases which had preceded it, that it was admitted to be the law by the defendant's counsel in arguing the case of *Erving v. Peters*, 3 T. R. 686. The fact therefore is conclusively established against the defendant, that he has assets of the testator in his hands; and the only question which remains is, what evidence is necessary to shew that he has wasted those assets. In reason and good sense, very little evidence ought to be necessary for that purpose. It is his duty, when called upon by notice, or by a writ of execution, either to satisfy the debt out of the monies of the testator, or to shew the assets to the sheriff, that he may make the debt out of them: and accordingly very slender evidence has at all times been held to be sufficient to prove the devastavit. The issuing of a writ of *fi. fa.*, directed to the county where the action was laid, and a return of *nulla bona* thereto, has for a long time past been deemed evidence enough. And yet, if the reason of the thing be considered, the suing out and return of such writ into the county where the action is laid, affords no necessary presumption that the defendant has ever heard of it; for, it is a mere fiction of law to suppose the defendant resident in the county where the venue is laid in a personal action: and even if he be, the sheriff would as a matter of course return *nulla bona* to the writ, unless authentic information was given to him where the testator's goods were to be found, and they were exposed to his officers (a). And, before the present practice prevailed of issuing a *fi. fa.*, and

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(a) An action of debt was brought by original writ against an administrator in another county than where the administrator was commorant, and before notice of the suit he paid divers debts of the intestate due by specialty, and so he had not assets to pay the debt in demand, having assets at the

day of the teste of the original. And now, the defendant appearing, pleaded this special matter, and concluded, so he had nothing remaining in his hands. And it was holden per Curiam to be a good plea. *Corbet's Case*, 1 Leon. 312.

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returning nulla bona thereto, it was usual for the sheriff to summon an inquest of office, and to return a devastavit in addition to his return to the writ of fi. fa., which, being an ex parte proceeding, gives no notice whatever to the defendant. In the present case, the plaintiff sued out a testatum fi. fa. to the sheriff of Litchfield with a return that the sheriff had caused to be levied the costs de bonis propriis of the defendant, and that the defendant had no goods or chattels of the testator in his hands to be administered. Now, it must be admitted that the testatum fi. fa. in this case was irregular, inasmuch as it proceeds upon the suggestion of an award of a writ of fi. fa. to the sheriff of London; whereas the court must take judicial notice that there are *two sheriffs* of London, not one only. But the testatum fi. fa. is *irregular* only; it is not a *nullity*. And if the plaintiff had applied to amend the recital, no doubt such amendment would have been permitted; and no objection could have been taken to the fi. fa. But the question is, as the testatum fi. fa. has been actually issued and returned, and no objection taken against its regularity, whether such return that the sheriff has actually levied the amount of the costs out of the proper goods of the defendant, and that there are no goods of the testator within his bailiwick, does not afford more satisfactory evidence that the defendant had notice of the claim, so as to call upon him to pay the debt or offer the goods of the testator to the sheriff, than if a fi. fa. had been, in the ordinary course, returned nulla bona by the sheriff of the county where the action was brought. And we feel no doubt that such is the case, and that the defendant was called upon at the trial, after the production of the testatum fi. fa. and return, to shew that he had not wasted the goods of the testator, but was ready to give them to the sheriff, so that it was the sheriff's fault that he did not make the debt out of them. And as no such evidence was offered by the defendant at the

trial, we think the plaintiff's evidence sufficient to establish a devastavit. We therefore think the rule for entering a nonsuit ought to be discharged.

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Rule discharged (a).

(a) The judgment against the executor being the foundation of the action, it follows that no action of debt suggesting a devastavit by the executor lies against him upon a judgment obtained against his testator, because that is no confession of assets by the executor, and therefore in such cases it is necessary to sue out a writ of sci. fa. against the executor, to make him a party to the judgment—*Crosby v. Geering*, cited in *Berwick v. Andrews*, 2 Ld. Raym. 972; to which writ the ex-

ecutor may plead a want of assets, or other plea which shews that the plaintiff ought not to have execution against him upon the judgment. Co. Ent. 617; *Noell v. Wilson*, 2 Saund. 220 a.; *Richards v. Newton*, 1 Ld. Raym. 3, 1 Salk. 296; *Ordway v. Godfrey*, Cro. Eliz. 575; *Littleton v. Hibbins*, Cro. Eliz. 793; *Gibson v. Brook*, Cro. Eliz. 887; *Knight v. Cole*, 3 Lev. 273; *Pechet v. Woolston*, All. 47; Went. 138.

And see Tidd's Practice, 9th edit. pp. 1025, 1113, 1114.

END OF TRINITY TERM.

MEMORANDUM.

The judges who sat in the Court of Common Pleas during the foregoing Term were:—

Lord Chief Justice TINDAL, Mr. Justice PARK, Mr. Justice GASELEE, and Mr. Justice VAUGHAN.

IN THE COMMON PLEAS.

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WILCOX and Others v. VINCENT and Others.

BY order of the Master of the Rolls, the following case was submitted for the opinion of this court:—

Richard Pearce, the testator in this case, being at the date of his will hereinafter stated, and thence until and at the time of his decease, seised in fee of certain freehold and copyhold estates in the counties of Hertford and Leicester, and at Westminster, and Rushden in the county of Northampton, by will bearing date the 30th March, 1813, duly executed and attested, gave, devised, and bequeathed such freehold and copyhold estates at Westminster and Rushden unto his cousin Thomas

Testator devised lands to his cousin T. P., for life, and, from and after the decease of T. P., to such of the testator's relations of the name of Pearce (being a male) as his cousin T. P. should by deed appoint; and, in default of appointment, to such of the testator's relations of the name of Pearce, being a male,

as T. P. should adopt, if he should be living at the time of the decease of T. P.; and, in case T. P. should not have adopted any such male relation of the testator, or in case he should have done so, and there should not be any such male relation living at the decease of T. P., then the testator devised the property to the next or nearest relation or nearest of kin to the testator of the name of Pearce, being a male, or the elder of such male relations in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, &c., for ever. The will also contained a power to T. P. to lease for any term not exceeding seven years. T. P., the tenant for life, died without issue, and without having executed the power of adoption given by the will. The nearest of kin of the testator living at the time of his decease, were—first, T. P.—secondly, R. P., the plaintiff—thirdly, W. P., a younger brother of R. P. The testator had a brother named Zachary, who, if living at the death of the testator, would have been his nearest of kin: but it appeared that he went to sea, and was never heard of after 1795:—Held, that, assuming Zachary to have died without issue in the lifetime of the testator, T. P. took an estate in fee under the ultimate limitation contained in the will.

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Pearce, his heirs and assigns, upon trust to sell and dispose of the same and apply the money arising from such sale in payment of debts and legacies in aid of his personal estate; and gave the surplus of such purchase monies, if any, unto his said cousin, Thomas Pearce, his executors, administrators, and assigns, to and for his and their own use and benefit: and the testator devised to Mary Heygate during her natural life one clear yearly annuity of 200*l.*, to be issuing and payable out of all and every his freehold and copyhold estates not hereinafter by him devised to his said cousin Thomas Pearce: and, subject to the payment of the said annuity, and all and every other annuity contained in that his will, or any codicil to be added thereto, and also under and subject to the directions, payments, powers, provisos, conditions, and declarations thereafter expressed and declared concerning the same, the testator gave, devised, and bequeathed his manors in the counties of Hertford and Northampton, and also all and every his lands, real estates, and hereditaments, both freehold and copyhold, situate and being in the several counties of Hertford, Leicester, and Northampton (except the Westminster and Rushden estates before devised, and the advowson of the church or rectory of Husband's Bosworth in the will mentioned, and the presentation thereto), or elsewhere the same might be situated, unto his said cousin Thomas Pearce and his assigns *for and during the term of his life*: and the testator gave, devised, and bequeathed all his said manors and his advowson of the parish church or rectory of Husband's Bosworth aforesaid, with its appurtenances, and all his lands and hereditaments, situate in the said counties of Hertford, Leicester, and Northampton, and elsewhere, with their appurtenances, and all his stocks, funds, and securities for money, and all and singular other his real and personal estate (save and except as thereafter or by any codicil to be added to his said will was

specifically bequeathed or mentioned), and also all his copyhold lands and hereditaments situate in the said several counties or wheresoever else the same might be situate (except the Westminster and Rushden estates thereinbefore devised)—subject nevertheless to the life estate thereinbefore given to his said cousin Thomas Pearce of and in the said manors and manorial rights, lands, hereditaments, freehold and copyhold estates, and to the payment of the said annuity of 200*l.* to Mary Heygate, and of all and every other annuity contained in that his will or codicil to be added thereto—to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisos, conditions, declarations, and agreements thereinafter mentioned, expressed, and declared, and thereinafter stated: and, in case such person, as thereinafter was mentioned, as the testator's cousin Thomas Pearce should approve of or adopt should be under the age of twenty-one years at the decease of the testator's cousin Thomas Pearce, the testator gave an annual sum of 200*l.* to be applied for and towards the maintenance and education of any person, being a male relation of the testator of the name of Pearce, whom the said Thomas Pearce should approve of and adopt, and should signify the same in writing under his hand (which the testator did thereby authorize and direct the said Thomas Pearce to do as soon after the testator's decease as he could conveniently), from the time of his said cousin Thomas Pearce's decease, until such person should have attained the age of twenty-one years: and, from and after the decease of the testator's cousin Thomas Pearce, the testator devised all and singular the said premises, as well his real estate as personal, and all accumulations thereof, to such of the testator's relations of the name of Pearce (being a male) as his cousin Thomas Pearce should by any deed or writing signed by him in the presence of two subscribing witnesses, or by his last will and testa-

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ment in writing by him to be executed in the presence of three or more credible witnesses, give, devise, or bequeath, or nominate or appoint the same to; and, in default of any such gift, devise, bequest, or nomination or appointment by the testator's cousin Thomas Pearce to or in favour of any such male relation of the testator of the name of Pearce as aforesaid, then the testator devised the said estates and premises to such of the testator's relations of the name of Pearce, being a male, as the said Thomas Pearce should adopt or approve of for the purposes of education as aforesaid, if he should be living at the time of the decease of the testator's cousin Thomas Pearce, and his heirs, executors, administrators, and assigns for ever: and, in case the testator's cousin Thomas Pearce should not have approved or adopted any such male relation of the testator as aforesaid, or in case he should have made such approval or adoption of any such male relation of the testator, and there should not be any such male relation living at the time of the decease of the testator's cousin Thomas Pearce, then the testator devised the said estates and premises unto *the next and nearest relation and nearest of kin of the testator of the name of Pearce, being a male, or the elder of such male relations in case there should be more than one of equal degree, who should be living at the testator's decease*, his heirs, executors, administrators, and assigns, for ever: and, as to the testator's advowson or rectory of Husband's Bosworth, the testator gave the first and next presentation to the same rectory which should happen after his decease unto certain persons therein mentioned in succession; and, in case none of them should choose to present themselves, or declare their intention of so doing by the time allowed them as therein mentioned, or should refuse the same (such refusal to be declared as therein mentioned) then the testator directed that the presentation to his rectory or living of Husband's Bosworth should at all

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times go and belong to his cousin Thomas Pearce, whenever the said rectory should become vacant, to present to at all times during the life of the said Thomas Pearce. The testator gave all his plate, books, and pictures, household goods, bed, bedding, linen, and household furniture at Husband's Bosworth and Stanwick, in his will mentioned, or elsewhere, to his executors, in trust to permit and suffer his cousin Thomas Pearce to have, use, and enjoy the same during his life; and, after his decease, then in trust for the person who should succeed to or inherit the testator's real estates under and by virtue of his will: and the testator declared his mind and will to be, and he did thereby order and direct his cousin Thomas Pearce to pay and apply so much of the rents and profits of the said estates so given, devised, and bequeathed by the testator to him for his life as aforesaid, not exceeding the annual sum of 200*l.*, as he in his judgment and discretion might think proper, for and towards the maintenance and education of such person, being a male relation of the testator of the name of Pearce, whom his cousin should approve of and adopt in manner aforesaid, in case such male relation should at the time of his adoption by the testator's cousin be a minor under age, until such person should have attained his age of twenty-one years; and to lay out and invest the residue of the said annual sum of 200*l.* (not expended in such maintenance and education) at interest, to accumulate, in the name of the testator's cousin Thomas Pearce, in some of the public funds, or upon government or real securities, during the minority of such male relation of the name of Pearce; and the testator declared and directed that his cousin Thomas Pearce, his executors, administrators, and assigns, should stand seised of such accumulations in trust for the benefit of such male relation of the name of Pearce, and the same, with the dividends and interest, should be assigned to him at such times and in such proportions after he should have at-

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tained his age of twenty-one years as the testator's cousin Thomas Pearce, his executors and administrators, should think most to his advantage; and, in case of his death before attaining twenty-one years of age, then in trust for the benefit of such male relation of the testator of the name of Pearce as should, upon the decease of the testator's cousin, become entitled to the testator's estates by virtue of his will: and, in case such male relation of the testator of the name of Pearce so approved of and adopted by his cousin Thomas Pearce as aforesaid, should, in the lifetime of his cousin, attain twenty-one years of age, then the testator willed and directed his cousin, during his life, to pay and allow out of the rents and profits of the estates so devised to him for his life as aforesaid, unto such male relation, from the time of his attaining the age of twenty-one years, the whole of the said annual sum of 200*l*.: Provided always, and the testator declared that it should be lawful for, and he did thereby authorize and empower his said cousin to demise or lease all or any part of his said manors, farms, lands, and tenements for any term or number of years not exceeding seven years, to take effect in possession, and at the best and most improved annual rent presently payable, and without taking any fine or premium, as therein mentioned.

Death of the
testator.

The testator died on the 3rd of January, 1814, without leaving any issue, and without having revoked or altered his said will.

Death of Thomas Pearce, the
tenant for life.

Thomas Pearce, the tenant for life named in the will, died without issue, and never did in any manner execute the power of adoption or selection of a relation of the testator under or according to the will.

State of the
testator's family
at the time of
his death.

The next or nearest relations or nearest of kin of the testator, living at his decease, of the name of Pearce, being males, were his three first cousins, viz.—first, the said Thomas Pearce, the tenant for life, who was the son of Robert Pearce, deceased, which Robert Pearce was

born in 1811, and was an uncle of the said Richard Pearce, the testator—secondly, Richard Pearce, the plaintiff in this suit, who was the son of the testator's uncle William Pearce, which William Pearce was born in 1715—and, thirdly, William Pearce, the younger brother of the said plaintiff. The aforesaid three cousins were, at the time of the decease of the testator, of the respective ages following:—Thomas Pearce, sixty-seven years—Richard Pearce, the plaintiff, sixty-six years—and his brother, William Pearce, fifty-nine years.

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The questions for the opinion of the court were—first, Questions. whether, under the circumstances stated, Thomas Pearce took any and what estate under the ultimate limitation contained in the will of the testator—secondly, whether, under the circumstances stated, the plaintiff, Richard Pearce, took any and what estate under the ultimate limitation contained in the will.

The case was argued in last Trinity Term.

Wright, for the plaintiffs.—Under this will Thomas Pearce took only an estate for life (a), and no other. It was obviously the intention of the testator to retain the estate in his family, and in the possession of a relative bearing his own name, for as long a period as possible; an intention that might have been defeated immediately on his death by Thomas Pearce, if he took a fee, making a will: and the whole of this will shews that the testator had no intention to provide for any person who should not be living at the time of his death. This intention would be frustrated and disappointed if such a construction were held to prevail—*Holloway v. Holloway*, 5 Ves. 399. An express power of appointment is given to Thomas Pearce, which clearly shews that the testator did not intend him to take more than an estate for life. A power

(a) It was admitted by *Preston*, an estate for life, then Richard that, if Thomas Pearce took only Pearce, the plaintiff, took a fee.

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also of leasing for seven years only is conferred upon him. "The next and nearest relation, or nearest of kin," contemplated by the testator, must be intended to mean, other than and except Thomas Pearce, to whom he had already given an estate for life. In *Briden v. Hewlett*, 2 Mylne & K. 90, the testator gave his personal estate to trustees, upon trust to convert into money and invest the same, and to pay the interest to his mother for her life; and, after the decease of his mother, he gave all his estate and effects to such person or persons as she should by her will direct and appoint; and in case his said mother should die without a will, then to such person or persons as would be entitled to the same by virtue of the statute of distributions. The mother survived the testator, and died intestate; and it was held that the persons who were the testator's next of kin at the death of the mother were entitled to the bequests. In *Bird v. Wood*, 2 Sim & Stu. 400, the testatrix bequeathed stock to her daughter for life, and, after her death, as she should appoint, and, in default of appointment, to the testatrix's next of kin, to be considered as a vested interest from the testatrix's death, except as to any child afterwards born of her daughter. The daughter having died without having had any child, and without executing any appointment—the Vice-Chancellor said: "The persons who at the testatrix's death would have been her next of kin if her daughter had been then dead without children, are plainly intended here. The daughter could not be such next of kin; for, the persons intended were to take at her death: and the persons intended must have been living at the death of the testatrix; for, their interests were then to be vested." In *Leigh v. Leigh*, Lawrence, J., says (15 Ves. 103), that, if the meaning of the words of a will, as they have been used by the testator, be ascertained, "no reasoning from supposed cases can induce the court to put a different construction upon the will, but can only lead to a conclusion that the testator did not see

all the consequences of the disposition he may have made; yet, in endeavouring to ascertain the meaning of a testator, the absurdities, improbabilities, and inconsistencies which may arise out of cases falling within one construction or another, have constantly been attended to, with a view of ascertaining such meaning." Here, the testator has left no room for doubt as to his meaning: the words "who shall be living at my decease" are evidently used designedly to exclude after-born persons. The testator's brother Zachary was clearly out of the contemplation of the testator: he had been unheard of for many years prior to the date of the will (a). The whole will shews a clear intention on the part of the testator to give a life estate only to his cousin Thomas Pearce: and by "*next* and *nearest* relation," he evidently intended the next after Thomas Pearce, and the nearest in relation to himself.

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Preston, contra.—The argument on the other side would be unanswerable had the limitation been to the next and nearest of kin of the testator who should be living at the death of Thomas Pearce. He who in the construction of a will seeks to put upon the words of it an interpretation different from their ordinary legal sense, is bound to shew most clearly that the testator used them in the sense imputed—*Holloway v. Holloway*, 5 Ves. 399. In *Harrington v. Harte*, 1 Cox, 131, a devisee to whom a life estate was given was held to take a fee as next of kin under a limitation similar in all respects to the present, notwithstanding the devise to him was accompanied by a power of appointment. In *Doe d. Garner v. Lawson*, 3 East, 278, the testator devised to his natural son, and, in case of his marriage with certain persons, or his dying without issue, then to his nephew for life, and, after his decease, then for and amongst such person and persons,

(a) It was admitted that this individual, who was born in 1761 (as appeared by a pedigree annexed to the case), went to sea, and had not been heard of since 1795.

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his and their heirs &c., as should appear and could be proved to be his next of kin, in such proportions as they would by virtue of the statute of distributions have been entitled to his personal estate if he had died intestate: it was held that the distribution was to be made amongst those who were the testator's nearest of kin at the time of his death, though the nephew, to whom a prior life estate was given, were one of them. In *Rayner v. Mowbray*, 3 Bro. C. C. 234, the distribution was not to take effect till after the death of the wife, and yet it was referred to such persons as would have been entitled to share at the death of the testator under the statute of distributions. *Jones v. Colbeck*, 8 Ves. 38, *Doe d. Cholmondeley v. Maxey*, 12 East, 589, and *Cholmondeley v. Clinton*, 2 Jac. & W. 1, are authorities to the same effect. The decision in *Bird v. Wood* turned upon the exception "as to any child afterwards born of the testatrix's daughter," which expressly excluded the daughter. In *Elmsley v. Young*, 2 Mylne & K. 82, where, on the failure of a particular gift to one for life, with remainders over, the next limitation in the deed was to the settlor, or such person as he should appoint, and, in default of appointment, to such person or persons as should at the time of his death be his next of kin—the settlor dying before the tenant for life without having made any appointment, the tenant for life, who was one of the settlor's next of kin, was held not to be excluded from the benefit annexed to that character. The testator's intention might have been defeated had he given the estate to Thomas Pearce by name; for, he might have died before the testator. It is said, that, if Thomas Pearce took the fee, he might, by making a will immediately after the testator's death, have defeated the presumed intention of the testator to keep the property in his family and name. If Richard took the fee, he might have done the same: therefore that argument fails.

Wright was heard in reply.

The following certificate was afterwards sent to the Master of the Rolls:—

“ This case has been argued before us by counsel, and we have considered the same, and, assuming Zachary Pearce, the testator's brother, to have died without issue in the testator's lifetime, we think, under the circumstances above stated, Thomas Pearce took an estate in fee under the ultimate limitation contained in the will of the testator. In consequence of our answer to the first question, it becomes unnecessary to answer the second.

“ N. C. TINDAL,
“ J. A. PARK,
“ S. GASELER,
“ J. VAUGHAN (b).”

(b) See 1 Cr. & M. 598.

HORNIDGE v. EYLAND.

*Tuesday,
Nov 3rd.*

ASSUMPSIT for work and labor done by the plaintiff as the attorney and solicitor of and for the defendant, and at his request, in and about the striking of divers dockets, and in and about the issuing and working of divers fiats and proceedings in bankruptcy for the defendant, and in and about the prosecuting and defending and soliciting divers actions and suits at law and in equity for the said defendant at his like request, and for certain fees due and of right payable to the plaintiff in respect thereof; and also for other work and labour, care, diligence, and attendance of the plaintiff by him before that time done, performed, and bestowed in and about the procuring the release of one W. Mills from imprisonment, and in and about the drawing, copying, and ingrossing of divers writings and proceedings of and for the defendant, at his

Although the money first received under a fiat is by the statute required to be appropriated in discharge of the expenses incurred by the petitioning creditor, yet, where *he* assents to a different appropriation, he is estopped from afterwards contending that the directions of the act have not been complied with.

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like request, and also in and about other affairs, matters, and business of and for the defendant, and for divers journeys and other attendances by the plaintiff before that time made, performed, and given in and about the said business of the defendant, and at his like request. Money counts. The amount of the plaintiff's demand was 38*l.* 19*s.* 5*d.* The defendant paid into court 15*l.*

The cause was tried before Tindal, C. J., at the Sittings at Westminster after the last term. The facts were as follow:—The plaintiff, as the solicitor of one Mills, on the 18th July, 1834, prepared a deed of assignment of his effects for the benefit of his creditors, one of whom was the present defendant. On the 18th August, Mills's effects were sold, and the proceeds paid over to the plaintiff. Before the sale, Mills committed an act of bankruptcy by laying in prison; whereupon a fiat was issued on the 15th September, upon the petition of the defendant. The defendant was appointed one of the assignees. The contention arose upon a sum of 25*l.*, the costs of preparing and incident to the deed of assignment, which the plaintiff claimed to retain out of the proceeds of the sale of Mills's effects, the defendant (who was the principal and almost the only creditor) having at a meeting before the commissioner (Fane) assented to the allowance of those costs out of the estate. On the part of the defendant, it was submitted that the petitioning creditor was entitled, under the 6 Geo. 4, c. 16, s. 14, to have the first money received under the fiat appropriated to the discharge of the costs incurred by him in the prosecution of the fiat. A verdict having been found for the plaintiff, damages 23*l.* 19*s.* 5*d.*, with leave to the defendant to move to enter a nonsuit—

Bompas, Serjeant, now moved accordingly.—He contended that the money arising from the sale of the bankrupt's effects after an act of bankruptcy, being the money of the assignees, it was not competent to the defendant to

give any assent to its appropriation other than in due course of law.

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TINDAL, C. J.—That the monies first received under the fiat must be appropriated in discharge of the expenses necessarily incurred by the petitioning creditor, is not disputed. But the question here is, whether the defendant has not, by his own voluntary act, estopped himself from taking the objection. The sum in dispute, it appears, was with his assent appropriated to the costs of preparing the deed of assignment. This assent might have proceeded from a consciousness on his part that he was personally responsible for those costs.

The rest of the court concurring—

Rule refused.

MACDONALD v. ROOKE.

Tuesday,
Nov. 3rd.

THIS was an action on the case for maliciously and without reasonable or probable cause charging the plaintiff with felony before a magistrate. The cause was tried before Lord Denman, C. J., at the last Assizes at Gloucester. The facts were as follow:—The plaintiff had been in the service of the defendant, whence she was discharged on Thursday, the 12th March last. On quitting the defendant's house, the plaintiff took away with her a trunk and carpet bag belonging to the defendant, and also a cloak belonging to a member of his family. The defendant, In an action for maliciously and without reasonable or probable cause charging the plaintiff with felony before a magistrate, it appeared that the plaintiff had lived in the service of the defendant, and on being discharged took away with her a trunk and bag, the property of the defendant; that, on the following day, the defendant wrote to desire the plaintiff to return those articles, and stating that unless she did so he would on the Monday following cause her to be apprehended; that, the letter being, in consequence of the plaintiff's absence, unanswered, the defendant obtained a warrant for the apprehension of the plaintiff, and carried her before a magistrate, who dismissed her, the defendant declining to press the charge. The judge before whom the cause was tried left it to the jury to say whether or not the defendant had reasonable or probable cause for apprehending the plaintiff, and whether he was actuated by malice or not:—Held, that this direction was proper, and that the judge was not bound to take upon himself to decide as to whether or not there was reasonable or probable cause—it being a mixed question of law and fact.

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on the following day, wrote to the plaintiff desiring her to return the articles in question, and stating that unless she did so he would on the Monday following cause her to be apprehended. The plaintiff being absent from her place of abode when the letter arrived, it remained unnoticed; and on the Saturday the defendant applied to a magistrate for a warrant, which being granted, the plaintiff was in the evening apprehended, and detained until the following Monday, when she was carried before the magistrate, and (the defendant declining to press the charge) dismissed. Upon this state of facts, his lordship left it to the jury to say, whether or not the defendant had reasonable or probable cause for apprehending the plaintiff, and whether he was actuated by malice or not. The jury returned a verdict for the plaintiff—damages 50*l*.

Platt moved for a new trial on the ground of misdirection.—Although the question of malice was properly a question for the jury, yet it was for the judge and not for the jury to say whether or not there was reasonable or probable cause for the apprehension of the plaintiff. In *Davis v. Hardy*, 6 B. & C. 225, 9 D. & R. 380, upon the trial of an action for maliciously indicting the plaintiff, the plaintiff proved a case which in the opinion of the judge shewed that there was no reasonable or probable cause for preferring the indictment. The defendant then called a witness to prove an additional fact, and, that being proved, the judge was of opinion that there was: it was held, that, there being no contradictory testimony as to that fact, and there being nothing in the demeanor of the witness who proved it to impeach his credit, the judge was not bound to leave it to the jury to find the fact, but that he might act upon it as a fact proved, and nonsuit the plaintiff. And in *Blachford v. Dod*, 2 B. & Ad. 179, which was an action by an attorney for maliciously and without probable cause indicting him for sending a threatening letter, it ap-

peared that his clients having inquired of the defendants as to the truth of a representation made by a person who had offered to buy goods of them, the defendants replied that they would not be responsible for the price of the goods, but believed the person had the employment he represented. The goods were then supplied to him. His representation turned out to be false, and the plaintiff, by the direction of his clients, wrote a letter to the defendants, demanding payment from them for the goods obtained from his clients through the defendants' representation, and stating that the circumstances made it incumbent on his clients to bring the matter under the notice of the public, if the defendants did not immediately discharge the amount; and that he had instructions to adopt proceedings, if the matter were not arranged in the course of the morrow; and that, as those measures would be of serious consequence to the defendants, he hoped they would prevent them by attention to his letter. The defendants were then summoned before a magistrate to answer a charge of obtaining goods under false pretences. The plaintiff served the summons, and attended for his clients, and the summons was dismissed. The defendants afterwards indicted the plaintiff for sending a threatening letter, contrary to the 7 & 8 Geo. 4, c. 29, s. 8, and he was acquitted. On the trial of this action, the judge, without leaving any question to the jury, decided that there was reasonable and probable cause for preferring the indictment: it was held that the decision was correct, and that the evidence did not raise a question of fact for the jury, whether the defendants bonâ fide believed that they had a reasonable cause for indicting; but a pure question of law for the judge, whether the defendants had such reasonable cause. *Ravenga v. Mackintosh*, 2 B. & C. 692, 4 D. & R. 187, is distinguishable from the present case: there, it was conceded that the prosecution was without

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reasonable or probable cause; the only question was whether or not the defendant had proceeded bonâ fide.

TINDAL, C. J.—There may be an entire absence of reasonable or probable cause, and yet no malice—the defendant may have acted with perfect good faith, upon advice. The construction of a threatening letter is undoubtedly for the judge alone. In such cases he ought to direct the jury as to whether or not there was reasonable or probable cause for the defendant's proceeding. But, where the question of reasonable or probable cause is a mixed question of law and fact, the absence of a distinct direction on the part of the judge is hardly ground for a new trial, where he is satisfied with the verdict. I think the present comes within that class of cases in which want of reasonable or probable cause depends, not upon a dry question of legal construction, but upon a chain of facts, the consideration of which ought not to be withdrawn from the jury. I therefore think there is no ground for disturbing the verdict.

PARK, J., concurred.

GASELEE, J.—I think his lordship did perfectly right in taking the opinion of the jury upon the facts.

BOSANQUET, J.—I am also of opinion that there was in this case matter for the consideration of a jury: it was for them to say whether the articles carried away by the plaintiff were taken animo furandi, or merely borrowed. There is no ground for a new trial.

Rule refused (a).

(a) In the course of the argument, *Taddy*, Serjeant, referred to 3 M. & P. 350; S. C. nom. Taylor v. Williams, 2 B. & Ad. 845. Willans v. Taylor, 6 Bing. 183,

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HALL and Another v. GOODRICKE.

Wednesday,
Nov. 4th.

THIS was an action on the case against the sheriff of Berkshire for taking insufficient pledges on a replevin-bond. The cause was tried before Lord Denman at the last Assizes at Abingdon. It appeared that the bond was taken in the penalty of 170*l.*; and that the amount due for rent was 68*l.*, and the costs of the replevin suit 120*l.* There was no evidence of the value of the goods seized, but it was assumed to have been 85*l.*, the half of the penalty in the bond. A verdict having been found for the plaintiffs, damages 170*l.*—

In an action on the case against the sheriff for taking insufficient pledges in replevin, the proper measure of damages is, the penalty of the bond, viz. double the value of the goods distrained.

Talfourd, Serjeant, moved (in pursuance of leave reserved at the trial) to reduce the damages to 85*l.* The cases upon the subject are conflicting: but, upon principle, there seems no reason why, the bond being conditioned in the alternative for the prosecution of the suit with effect, or for a return of the goods distrained, the sheriff should be liable to an amount exceeding the value of the goods. It was so determined in the case of *Yea v. Lethbridge*, 4 T. R. 483. Lord Kenyon there says: "In order to see to what amount the sheriff is answerable, it is necessary to inquire what would have been the consequence if he had taken sufficient pledges. Now, the duty of the sheriff, as prescribed by the act of parliament, is, to take a bond for prosecuting the suit, and for a return of the goods distrained if a return shall be awarded (11 Geo. 2, c. 19). Then, if he had taken such a bond, how would it have been satisfied? By returning the goods taken. Then, the value of those goods seems to be the true measure of damages to be given in this action." And Grose, J. says: "The duty of the sheriff is accurately pointed out by the statute of Westminster 2, which requires 'that sheriffs shall not only receive of the plaintiffs

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pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts if return awarded. And if any take pledges otherwise, he shall answer for *the price of the beasts*.' And the 11 Geo. 2 does not enlarge the sheriff's responsibility in this respect." In the next case that occurred, *Concanen v. Lethbridge*, 2 H. Blac. 36, it was held that the plaintiff might recover damages beyond the penalty of the bond, that is, more than double the value of the goods distrained. But, in *Evans v. Brander*, 2 H. Blac. 547, the court said, "that, notwithstanding the late determinations on the subject, the good sense and justice of the case seemed to be, that the sheriff should be liable no further than the sureties would have been if he had done his duty and taken a bond under the statute 11 Geo. 2, c. 19, and they had been sufficient; that their responsibility was limited by that statute to double the value of the goods distrained, which sum ought to be the measure of damages against the sheriff." And the rule was made absolute to reduce the damages to the amount of double the value of the goods distrained; but, as appears by the report, *by consent*. In *Baker v. Garratt*, 3 Bing. 56, 10 Mo. 324, it was sought to charge the sheriff with the costs of a fruitless action against the sureties on the bond; but the court decided in conformity with *Evans v. Brander*. In *Scott v. Waithman*, 3 Stark. 168, however, Abbott, C. J., intimated an opinion in conformity with the decision of the court of King's Bench in *Yea v. Lethbridge*: in leaving the case to the jury, his Lordship said: "As the verdict in the replevin suit was merely for a return of the goods, the jury could not in their verdict exceed the value of the goods;" and that ruling was not disputed. In this conflict of opinions, unless the court shall be of opinion that the rule laid down in *Evans v. Brander* has settled the point, the defendant will be entitled to a rule.

TINDAL, C. J.—In *Hefford v. Alger*, 1 Taunt. 218, it

was held that the measure of liability of the sureties in a replevin bond is the amount of the penalty, and the costs of the suit on the bond. After that decision, coupled with *Evans v. Brander*, I do not think the court would be warranted in throwing the point open again by granting a rule.

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PARK, J.—In *Evans v. Brander*, the liability of the sheriff and the liability of the surety are said to be correlative. I concur in thinking that the point is definitively settled by the decisions referred to by his lordship, and that the amount of the penalty is the only measure of the damages whether against the sheriff or against the sureties in the bond.

The rest of the court concurring—

Rule refused.

BOYCE v. CHAPMAN and Another.

Thursday,
Nov. 5th.

THIS was an action on the case against coach proprietors for the loss of a parcel containing money and notes. The defendants pleaded—first, not guilty—secondly (on the statute 11 Geo. 4 & 1 Will. 4, c. 68, s. 1), that, at the time of the delivery of the parcel to the defendants for the purpose of being carried, the value and nature of the articles contained in it were not declared, nor was any increased rate of charge received by the defendants as a compensation for the greater risk and care to be taken for the safe conveyance of such articles. The plaintiff replied (on s. 8) that the loss was occasioned by the felonious act of the defendants' servant.

In an action against coach proprietors for the loss of a parcel containing cash and notes, it appeared that the parcel had arrived at the defendants' coach-office in August, 1834, and was there lost; that, in June, 1835, a porter who was in the employ of the defendants at the time of the

loss was sent by a guest at the hotel in the yard in which the office was situate with a 5*l.* note and five sovereigns to get a 10*l.* note in exchange for them; that the porter procured a 10*l.* note at a shop in the neighbourhood, and gave a 10*l.* note to the guest, which note proved to be one that had been contained in the lost parcel, and which the person from whom the porter was supposed to have procured it stated that he thought was not the same note he had given him. Upon an issue as to whether or not the parcel was lost through the felonious act of the defendants' servant, the jury having found for the plaintiff, the court refused to grant a new trial; the defendants not having called the porter.

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The cause was tried before Gaselee, J., at the last Assizes for the county of Warwick. The facts that appeared on the evidence were as follow:—The plaintiff's traveller made up the parcel in question in August, 1834, and delivered it to the guard of a coach running between Manchester and Knutsford, with directions to forward it to Birmingham by the Liverpool mail. The parcel found its way into the defendants' coach-office at Birmingham, and was there lost. On being made acquainted with the contents of the parcel, the defendants issued handbills describing them and offering a reward of 20*l.* for their restoration. In June, 1835, a 10*l.* note, part of the lost property, was stopped at the Bank of England, and subsequently was traced to Mrs. Chapman, the mother of one of the defendants, who keeps an hotel at Birmingham, in the yard of which the defendants' office is situate. Mrs. Chapman's possession of the note was thus accounted for: On the 22nd June, 1835, a traveller staying at the hotel, wishing to procure a 10*l.* note for a 5*l.* note and five sovereigns, gave the latter to the waiter, who handed them to a person named Matthews, one of two porters employed at the defendants' office at the time of the loss; Matthews went out, and shortly afterwards returned with the 10*l.* note in question, which was given to the guest, *who paid his bill with it the next morning*. On the part of the defendants, a person named Arthur, clerk to a tradesman in the town, was called. He proved that Matthews came to his employer's shop to get a 10*l.* note for a 5*l.* note and five sovereigns: but, on the stolen note being shewn to him, he said he *thought* it was not the note he had given to Matthews. It was thereupon contended on the part of the plaintiff, that Matthews had substituted the stolen note for that which he had received from the witness Arthur. Another witness, with whom Matthews had lived for a period of four or five years before he entered the defendants' service, gave him a high character. Matthews him-

self was not called, though he continued in the service of the defendants: nor did it appear that any proceedings had ever been taken against him. A verdict having been found for the plaintiff—

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Balguy now moved for a new trial.—He submitted that, the statute referred to being passed for the protection of carriers, in order to deprive the defendants of the benefit of it, it was incumbent upon the plaintiff to give specific evidence of a felonious act on the part of their servant, so as to ensure his conviction on a criminal charge, or at least such evidence as would afford a justification for presenting the case to a grand jury: whereas here there was no evidence whatever to trace the note to Matthews, and, considering the lapse of time between the loss of the parcel and the circulation of the note, no case for the jury—not enough reasonably to warrant even a suspicion against him.

TINDAL, C. J.—I agree that the evidence to implicate Matthews in a charge of felony was extremely slender; but undoubtedly there was evidence to go to the jury, and the defendants had it in their power to call a witness who could have put the matter beyond doubt. It appears that the parcel was stolen in August, 1834, and that ten months afterwards one of the notes that had been contained in it was found in the possession of a person who was in the employ of the defendants at the time of the felony. That I must acknowledge was, under the circumstances, but very slender evidence whereon to charge Matthews with the theft. But, observe how different the two cases: if he were indicted for it, Matthews's explanation of the transaction would not be evidence; here it would have been. The defendants had every ground for relying upon his testimony. Who so well as he could have told whether the note in question was that which he had received from

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Arthur or a substituted one? As therefore there was some evidence for the jury, and there was testimony in the power of the defendants to produce which was not produced, I think there is no sufficient ground to warrant us in granting a new trial.

PARK, J.—I am of the same opinion. To grant a new trial in this case would be establishing a very dangerous precedent. The defendants, after having heard all the plaintiff's evidence, come to ask for a new trial, because they on the former occasion neglected to call a witness they might have called. I am satisfied that the verdict was right. The lapse of time between the robbery and the circulation of the note, instead of being a circumstance in favour of the porter's innocence, seems to me to bear strongly the other way. If he were the guilty person, he would naturally retain the note in his possession until all suspicion was lulled.

GASELER, J.—The case was peculiarly one for the jury, and was fully left to them; and I must confess I was by no means dissatisfied with the verdict.

BOSANQUET, J.—The evidence was all one way. The defendants had in their possession a witness whose testimony was most important, and they did not choose to call him. I think, under the circumstances, they are not entitled to ask for a new trial.

Rule refused.

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ATKINSON and Another, Assignees of POTTER, a Bankrupt,
v. BRINDALL.

Thursday,
Nov. 5th.

THIS was an action brought by the plaintiffs as assignees of one Potter, a bankrupt, to recover the amount of certain cash and bills alleged to have been paid by the bankrupt to the defendant by way of fraudulent preference. The cause was tried before Williams, J., at the last Assizes at Worcester. Potter & Walford were carpet manufacturers at Kidderminster. Their circumstances becoming embarrassed, Walford, in the beginning of 1834, left this country and went to America. On the 14th February in that year, a fiat in bankruptcy was taken out against Potter, but was subsequently abandoned. On the 15th March, 1834, Potter executed an assignment of all his effects for the benefit of his creditors, under which they stipulated to receive 12s. in the pound in satisfaction of the debts due to them respectively. Between the date of this assignment and the 15th January, 1835, the defendant lent money to Potter at various times, amounting in the whole to 205*l.* Towards the close of the year 1834, Potter became further embarrassed. On the 15th January, 1835, he, having dishonored two bills on the 13th, and without any pressure or solicitation on the part of the defendant, sent him 121*l.* 3*s.* in cash, and two bills, the one for 56*l.* 9*s.*, the other for 27*l.* 8*s.* 3*d.* : and on the 28th of the same month a second fiat issued against him, under which he was duly declared a bankrupt. Upon this state of facts, the learned judge left it to the jury to say whether Potter contemplated bankruptcy at the time he made the payment in question to the defendant : telling them that a contemplation of insolvency was not sufficient to invalidate the payment. The jury found for the defendant.

In order to constitute a fraudulent preference, so as to avoid a payment made by a trader, it must be a voluntary preference and made in actual contemplation of bankruptcy : it is not enough to shew that the party was in such a state of insolvency and embarrassment as to render bankruptcy a probable event.

Ludlow, Serjeant, now moved for a new trial, on the

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ground of misdirection. He submitted, that, from the desperate circumstances in which Potter appeared to have been for more than a year, and the fact of the payment in question having been made voluntarily and after the dishonor of two bills only two days before, and the fiat following so speedily, he must have contemplated bankruptcy to be extremely probable, if not inevitable; which was sufficient to render the payment a fraudulent preference. And he relied on the case of *Poland v. Glyn*, 2 D. & R. 310, 4 Bing. 22, 12 Moore, 109, n., where it was held, that, if a person in trade pay a sum of money to one of his creditors, and his affairs are in such a state that he may reasonably anticipate bankruptcy at the time he makes such payment, it is fraudulent: and Bayley, J., says: "I take the general rule of law upon this subject to be, that a voluntary payment to one creditor under circumstances which must reasonably lead the debtor to believe bankruptcy *probable* (not *inevitable*, for, I do not think it necessary the rule should go that length), is a fraud upon the other creditors, within the meaning of the bankrupt laws; and that money so paid may be recovered by the assignees when a bankruptcy has taken place."

TINDAL, C. J.—It seems to me that the direction of the learned judge in this case was substantially correct. Down to the time of his actual bankruptcy, a trader has the unrestrained dominion over his own property. The only exception to the rule is, that, if he disposes of any part of it, contemplating bankruptcy at the time, and intending to prevent the equal and just distribution provided by the law, he thereby commits a fraud. The mere contemplation of insolvency, however, does not necessarily involve a contemplation of bankruptcy. This matter has lately undergone the consideration of the court of King's Bench in the case of *Morgan v. Brundrett*, 5 B. & Ad. 296, 2 N. & M. 280, where the whole court agree that the question for

the jury is, whether bankruptcy and not mere insolvency is contemplated. Littledale, J., says: "The late cases with reference to the question whether a payment or delivery of goods has been made in contemplation of bankruptcy, have gone much further than they ought." Parke, J., adds: "In order to render the deposit void, it was incumbent on the plaintiffs to shew, first, that it was made in contemplation of bankruptcy, and, secondly, that it was voluntary. There was very slight evidence that it was made in contemplation of bankruptcy. The meaning of those words I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankrupt. It is not sufficient that it should be made (as may be inferred from some of the late cases) in contemplation of insolvency. These cases I think have gone too far." And Patteson, J.—"The recent cases have gone too great a length. They seem to have proceeded on the principle, that, if a party be insolvent at the time when he makes a payment or delivery, and afterwards become bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment: but I think that is not correct; for, a man may be insolvent, but yet not contemplate bankruptcy." In the present case there certainly was very little evidence before the jury: but I am not prepared to say that I am so far dissatisfied with the verdict as to feel inclined to interfere in a question that is peculiarly and almost exclusively within their proper province.

PARK, J.—I think the case of *Morgan v. Brundrett* puts this question upon the true ground. The direction of the learned judge was in conformity with that authority, and in my opinion perfectly correct.

GASELEE, J., concurred.

BOSANQUET, J.—I also am of opinion that the direction

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in this case was right. The principle upon which voluntary payments to favoured creditors made before the commission of an act of bankruptcy are avoided, is, that such payments are a fraud upon the bankrupt laws. A voluntary payment or delivery can only be a fraud upon the bankrupt laws, where the party making it contemplates at the time the issuing of a fiat against him.

Rule refused.

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Upon an issue directed to try whether one P. had committed an act of bankruptcy on a given day, it appeared that, on the preceding day, he sent a letter from his dwelling-house at Greenwich, to his place of business, addressed to his son, stating that he was unable to meet his engagements, and desiring that he might be denied to any creditor who might call; that immediately after dispatching this letter, he left home, and remained absent during the whole of that and the following day. A witness proved that P. called on the day in question at her brother's house in London; that he expressed to her an apprehension of being sent to the Fleet, and stated that he was in no hurry to get home, and would not go very early, as he had creditors who would lay hold of him; and that he did not leave till after dark. The jury were told, that, if they believed the statements made by the witness, P. on that occasion committed an act of bankruptcy: they said they did believe the witness, but they did not think P. spoke with bona fides:—Held, that P. had committed an act of bankruptcy: and that evidence of his conduct and conversations on the day subsequent to the date mentioned in the issue, was not admissible to explain his conduct on that day.

JOHNSTON v. WOOLF.

UPON an issue to try whether or not one C. Pearson had committed an act of bankruptcy on the 18th June, 1835, before five o'clock in the afternoon, the following facts appeared in evidence before Park, J., at the last Assizes at Croydon.

Pearson was a manufacturing chemist residing at Greenwich. Prior to the day in question he was in embarrassed circumstances; two of his acceptances, one for 150*l.*, and another for 350*l.*, being then overdue and dishonored. Three acts of bankruptcy were set up—first, a beginning to keep house—secondly, an absenting for the purpose of delaying creditors—thirdly, the fraudulent disposal of goods. As to the latter, there was no evidence. As to the keeping house, the only evidence consisted of a letter written by Pearson to his son, and sent by him from his dwelling-house to the manufactory on the morning of the 17th June, to the following effect:—"As I find myself, from

some demands now pressing urgently on me, unable to meet my engagements with my creditors, I request, if any of them call, that you will deny me to them; and inform Mr. C. (a clerk) to the same effect." His intention to keep house, however, was not carried into effect; for, he immediately left home. Upon this there was no finding: but the letter was used as evidence in support of the second act of bankruptcy, viz. an absention for the purpose of delaying creditors. Pearson did not return home on the 17th until twelve o'clock at night. On the 18th, he again left home at an early hour in the morning, and did not return until evening. To account for these absences, it was proved, that, on the 17th, Pearson attended the hearing of a cause in Chancery to which he was a party; that he was one of the directors of the Steam Navigation Company; and that the 18th was a day on which one of the weekly meetings of the directors was held; though it did not appear that he had actually attended that meeting. A witness named Marsh proved, that, on the 18th, between four and five o'clock, Pearson called at the house of her brother, in Calthorpe Street, and stated that he wished to know whether he was personally acquainted with the warden of the Fleet prison, to which place he was afraid he should be sent; that, upon her saying she would hasten tea, he observed that she need not trouble herself, for that he was in no hurry to get home, that he had creditors who would lay hold of him, and that he wished to get home if he could with safety, but would not go very early; and that he left Calthorpe Street after dark. Pearson's clerk was also called, and it was proposed to question him as to what was said or done by Pearson on the 19th. The learned judge, however, refused to receive his examination, observing that it would not be evidence in support of the issue. The jury having retired for some time, returned into court and asked the judge two questions, one of which was, whether the

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conduct of Pearson in staying in Calthorpe Street amounted to an act of bankruptcy. The learned judge told them, that, if they believed the statement made by Miss Marsh, Pearson did on that occasion commit an act of bankruptcy. The jury said they did believe Miss Marsh; but they did not think Pearson spoke on that occasion with bona fides. A verdict having been returned for the plaintiff—

S. B. Harrison now moved for a new trial, on the grounds that the verdict was against the evidence, and that the testimony of the clerk had been improperly rejected.—The act of absenting is in itself equivocal, and susceptible of explanation. Taking the evidence of Miss Marsh with the observation of the jury thereon as to the absence of bona fides in the communication made to her by Pearson, there is nothing to warrant the inference that he on that occasion absented himself from his home and business with intent to defeat or delay his creditors.—Then, as the absenting is an equivocal act, and the motive of the party must be shewn, his subsequent conduct is surely evidence to explain such act. That which the supposed bankrupt did on the 19th June, being a part of the same course of acting, ought to have been submitted to the jury. In *Rawson v. Haigh*, 2 Bing. 99, 9 Moore, 217, 1 C. & P. 77, a letter written by a bankrupt shortly after his absenting himself from his home, was held to be admissible to shew his motive in going. And in *Ridley v. Gyde*, 9 Bing. 349, 2 M. & Scott, 448, 'a trader, being pressed for payment of a debt by the attorney of a creditor, promised to give him a security on the following day; instead of which he left his place of residence, and immediately afterwards gave securities to another creditor, a relation. On his return home, at the expiration of nearly a month, the attorney of the former creditor, in the course of conversation, asked him what security he had given his relation; to which he replied, "he did not

know:"—it was held that the declarations of the debtor in that conversation were admissible in evidence to support an alleged act of bankruptcy in giving securities to his relation by way of fraudulent preference, and to shew the conduct of the party giving them; although it was objected that the conversation took place in the absence of the person to whom the securities were given, and at too great a distance of time (a month) from the completion of the transaction.

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TINDAL, C. J.—It appears to me that the question in this case was properly left to the jury, and that the conclusion they have drawn from the evidence laid before them was the correct one. The act of bankruptcy was completed by the absenting of the party on the 18th June. It is said that the act of absenting is in itself ambiguous, and may be innocent. It certainly is so. But, let us look at all the circumstances. On the morning of the 17th, Pearson sends a letter to his son at the manufactory, telling him that he finds himself unable to meet his engagements with his creditors, and requesting that he may be denied if any of them call. This looks very like a beginning to keep house: but it seems that after he had dispatched this letter, he thought better of it, and ran away. Then we find him absent from his home and place of business during the whole of that and the next day; and this absence almost entirely unaccounted for: there was no proof that he attended the board of directors of the Steam Navigation Company. If the case had rested there, I should have thought there was abundant evidence for the jury. But, in addition to this, we have the testimony of Miss Marsh as to the conversation that took place at her brother's house, clearly explaining the bankrupt's motive for delaying his return to Greenwich. The jury said they gave credit to the witness, but added that they did not think the bankrupt spoke with bona fides. But he

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is not the less a bankrupt because he told a falsehood to Miss Marsh: and we are not on that account to overlook all the rest of the evidence. I am clearly of opinion that the verdict is correct. I also think the learned judge properly rejected the evidence tendered as to the conduct of Pearson on the 19th June: that was expressly excluded by the terms of the issue. In the cases cited, the letters and declarations were properly admitted to shew the motive of the bankrupt's absence; the act of bankruptcy being in course of commission, they formed part of the transaction.

PARK, J.—I am of the same opinion. There was a clear act of bankruptcy completed on the 18th. From the whole course of the evidence it appeared that the party's absence was occasioned by the fear of arrest; and, being absent, his return was for the same reason delayed until an hour when he could return in safety. An act of bankruptcy being once committed, it could not be purged by anything that took place afterwards.

GASELEE, J., concurred.

BOSANQUET, J.—I am also of opinion that the verdict was right. There was a clear act of bankruptcy committed by Pearson by absenting himself on the 17th, and remaining away during the whole of that and the next day. The 19th is expressly excluded by the terms of the issue. The act of bankruptcy being complete on the 18th, the issue was satisfied.

Rule refused.

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DUMSDAY, Demandant, HUGHES, Tenant.

THIS was a writ of right. The count had been delivered, and the tenant had obtained a rule for a view. The tenant being unable to discover who the demandant was, in June last obtained a judge's order for the disclosure of his place of abode. That order not having been complied with, an application was in the beginning of October made to the Lord Chief Justice, and on the 13th, his lordship made an order upon the demandant's attorney to deliver to the tenant's attorney within four days the true name and address of his client. No notice having been taken of this order—

Wilde, Serjeant, moved for leave to sign judgment of nonpros. He submitted that the court, having the general power to interpose to prevent the abuse of its process, and having a right to be informed who the suitors are, were under the circumstances warranted in granting relief to the tenant in the form prayed; which, if any real demandant did exist, could not operate to his prejudice.

TINDAL, C. J.—The proceedings being regular, I do not see how we can accede to this application. It is not like the case of a common motion for judgment as in case of a nonsuit: the nonpros would be a final bar to the demandant's claim.

The rest of the court concurring —

Rule refused (a).

(a) *Wilde*, Serjeant, afterwards suggested that the proper course probably would be, to make the judge's order a rule of court, and

then move for an attachment against the attorney. To this the court assented.

In a writ of right the judgment,

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The tenant in a writ of right, not being able to discover who the demandant was, obtained a judge's order directing the demandant's attorney to deliver to the tenant's attorney, within four days, the true name and address of his client. The court refused to allow the tenant to sign judgment of nonpros for disobedience of this order.

Semble, that the proper course would be to make the order a rule of court, and apply for an attachment against the attorney.

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Service of a declaration in ejectment upon the wife of the son of the tenant in possession on the premises, who at the time of such service informed the party who made the service that the tenant was in America, and that her husband (the son) was transacting the business of the house:—Held, sufficient for a rule nisi.

MR. Serjeant *Wilde* moved for judgment against the casual ejector, upon an affidavit which stated that the deponent called at the premises—a public house at Mitcham, in Surrey—for the purpose of serving William Leach, the tenant in possession, with a copy of the declaration, when the deponent was informed by Mary Leach, the wife of Henry Leach, the son of the said William Leach, that the said William Leach was then in America, and that her husband, the said Henry Leach, was transacting the business of the said public-house; whereupon

whether upon default, demurrer, confession, or verdict, is final, because the thing demanded is certain. The judgment for the demandant is, that he recover against the tenant his seisin of the tenements with the appurtenances, to hold to him and his heirs, quit of the tenant and his heirs for ever—*Tyssen v. Clarke*, 3 Wils. 563; for the tenant, that the demandant take nothing by his writ, but be in mercy for his false claim, and that the tenant go thereof without day; and also that the tenant hold the tenements with the appurtenances to him and his heirs, quit of the demandant and his heirs—*Co. Litt.* 295. b.

In some cases, the judgment in a writ of right will be a final bar to the party against whom it is given, so as to preclude him from recovering the lands in another writ of right, or in any other action. On this account, such judgment is called a final judgment.

The rule laid down by Fitzherbert, J., is, that judgment final shall not be given in a writ of right, but after the mise joined—26 H. 8, 8. However, if the mise be joined upon the mere right, although the verdict of the grand assize be given upon another point, yet the judgment shall be final, as it shall also be if the tenant, after the mise joined, make default, or confess the action; or if the demandant be nonsuit—*Co. Litt.* 295. b.; *Herne v. Lilburn*, 1 Bulstr. 161; admitted in *Chetnam v. Sleigh*, Carth. 47: but see *Penryn's case*, 5 Rep. 85. b. When a petit cape must issue before judgment, see 1 Bulstr. 161, *Roscoe on Real Actions*, 282.

The tenant in a writ of right may have judgment as in case of a nonsuit, but cannot have costs—*Newman v. Goodman*, 2 W. Blac. 1093, 1110; *Almgill v. Piereson*, 1 Bos. & Pul. 103.

the deponent delivered a copy of the declaration and notice to and left the same with the said Mary Leach, on the premises, and explained to her the intent and meaning of such service. He cited Impey's Practice, 6th ed. 591. *Fenn v. Denn*, Barnes, 192.

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TINDAL, C. J.—The fact of the tenant being in America, and that his son carried on his business and represented him in his absence, resting solely upon the information given to the deponent by the son's wife, we can only grant a rule nisi, which may be served upon the son upon the premises.

Rule nisi accordingly (a).

(a) The rule was afterwards made absolute, no cause being shewn.

CANNELL v. CURTIS.

Monday,
Nov. 9th.

THIS was an action on the case for a libel. The first count of the declaration stated, that, before the committing of the grievances by the defendant as thereafter alleged, to wit, on the 31st March, 1834, the plaintiff had been appointed and was assistant overseer of the parish of West Rudham, in the county of Norfolk, and had made out and passed certain accounts of him the said plaintiff as such assistant overseer as aforesaid, the same containing (amongst other things) an account of the receipts and

A declaration for libel contained an averment that the plaintiff had been appointed and was assistant overseer of the parish of R., and made out and passed certain accounts of him the plaintiff as such assistant overseer, the same containing

amongst other things an account of the receipts and disbursements of the plaintiff as such assistant overseer, and which said accounts the plaintiff had verified on oath. The libel consisted of a memorandum written at the foot of the accounts, charging the plaintiff with perjury in the verification of them. At the trial it was proved that the plaintiff had acted as assistant overseer under a warrant of appointment by justices pursuant to the 59 Geo. 3, c. 12, by which he was empowered to execute all the duties appertaining and incident to the office of the ordinary overseer; and that the accounts in question were headed "overseers' accounts," but were in fact the accounts of and kept by the assistant overseer:—Held, that the allegation was sufficiently proved—the plaintiff not being bound to shew that all the steps anterior to the warrant for his appointment had been regularly taken, it being part of his duty as assistant overseer to verify the accounts, and the accounts being in reality his accounts.

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disbursements of the plaintiff as such assistant overseer, and which said accounts so made out the plaintiff, before the committing of the said grievances, to wit, on &c., had verified on the oath of him the said plaintiff: yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff in his good character, and to bring him into public scandal, infamy, and disgrace, and to subject him to the pains and penalties by law provided against persons guilty of the crime of perjury, and to cause it to be suspected and believed that the plaintiff had conducted himself improperly and extravagantly in his said office of assistant overseer, and that the said accounts so by him made out and verified on oath as aforesaid were, in the knowledge of the plaintiff at the time they were so verified on oath, incorrect, and that he the plaintiff, by so verifying the same accounts on oath, had been guilty of perjury, on the 12th June, 1834, wrongfully and unjustly did compose and publish a certain false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, and of and concerning him as such assistant overseer as aforesaid, containing the several false, scandalous, malicious, and defamatory words and matters following of and concerning the plaintiff, and of and concerning him as such assistant overseer as aforesaid, and of and concerning the plaintiff's accounts and the verification thereof by the plaintiff on oath as aforesaid—that is to say, "These disbursements I consider improper and extravagant; the accounts are improper and incorrect, and are passed and balanced without my knowledge or consent; and the person who has sworn to them has perjured himself in the most deliberate and wilful manner."

The defendant pleaded—that, at the time mentioned in the first count of the declaration, the plaintiff had not been appointed and was not assistant overseer of the poor of the parish of West Rudham, in the county of Norfolk, and

had not made out and passed certain accounts of him the plaintiff as such assistant overseer as aforesaid, the same containing, amongst other things, an account of the receipts and disbursements of the plaintiff as such assistant overseer, and which said accounts so made out as aforesaid the plaintiff, before the committing of the alleged grievances in that count mentioned, had not verified on the oath of the plaintiff—concluding to the country.

The cause was tried before Lord Abinger, C. B., at the last Assizes for the county of Norfolk. The facts were as follow:—In the years 1833 and 1834, the plaintiff was the assistant overseer of the poor of the parish of West Rudham, in Norfolk, acting under an appointment by justices pursuant to the 59 Geo. 3, c. 12 (a), by which he was empowered to execute all the duties appertaining and incident to the office of the ordinary overseer. The warrant for the plaintiff's appointment recited that he had been duly elected. It was a part of the plaintiff's duty as such assistant overseer to make the entries of all receipts and disbursements on account of the parish; and to make out an account at the end of each year, and verify it on oath before two justices. The accounts in question were in

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(a) Section 7, which enacts "that it shall be lawful for the inhabitants of any parish in vestry assembled to nominate and elect any discreet person or persons to be assistant overseer of the poor of such parish, and to determine and specify the duties to be by him or them executed and performed, and to fix such yearly salary for the execution of the said office as shall be thought fit; and it shall be lawful for any two of his majesty's justices of the peace, and

they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected; and every person appointed assistant overseer is hereby authorized and empowered to execute all such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed, in like manner and as fully to all intents and purposes as the same might be executed by any ordinary overseer of the poor."

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the handwriting of the plaintiff, and signed by him, but were headed "Overseers' accounts;" and at the foot was the following memorandum:—

"1834, March 31st. Verified on oath of Annison Cannell, overseer of the parish of West Rudham, and allowed by us until just cause shewn to the contrary.

"Edward Marsham.

"Joseph Scott."

On the part of the defendant it was objected that the warrant of the magistrates was not sufficient evidence that the plaintiff had been duly appointed assistant overseer; and that the accounts produced did not support the allegation in the declaration that the accounts passed were the accounts *of the plaintiff*. His lordship reserved the consideration of these points for the court; and the jury returned a verdict for the plaintiff—damages 50*l*.

Storks, Serjeant, in Easter Term, obtained a rule nisi to enter a nonsuit, on the grounds urged at the trial, and also on the ground that the writing in question did not constitute a libel, inasmuch as the oath was voluntary, the assistant overseer not being required by the statutes 17 Geo. 2, c. 38, s. 1, and 50 Geo. 3, c. 49, s. 1, to verify his accounts on oath, and consequently such an oath not being one for which an indictment for perjury would lie.

Biggs Andrews now shewed cause.—It is only necessary for the plaintiff to shew that there was *some* evidence to sustain the verdict. If the word *appointed* had not been found in the declaration, there still would have been a sufficient general allegation that the plaintiff *held* the office of assistant overseer. In *Rex v. Verelst*, 3 Camp. 432, it was held, that, on an indictment for perjury in a proceeding before a surrogate, it is *prima facie* sufficient to prove that he has generally acted in that capacity. And in *Berriman v. Wise*, 4 T. R. 366, in an action by an attorney

for words spoken by him in his profession, it was held that he need not prove that he is an attorney by his admission, or by a copy of the roll; proof that he acted as such is sufficient. In the present case the plaintiff proved that he had in fact acted as assistant overseer. If further proof was required, it was not wanting: the warrant of appointment by the magistrates was produced. It was not necessary to go further, and prove that a vestry had been duly held in pursuance of the 58 Geo. 3, c. 69, s. 1 (b), and that such vestry, so being duly assembled, nominated and elected the plaintiff to be assistant overseer. The general overseers were appointed by the magistrates: it was necessary that they should be principal inhabitants of the parish; and yet no proof of that fact was ever required. So, the parish surveyor is by statute required to be appointed in a certain way: a nomination takes place, and a list is made out, and the appointment of an individual on the list is made by the magistrates; and such nomination and list were never required to be proved. The recital here of the nomination and election in the appointment is at least *prima facie* evidence that such nomination and election took place: the magistrates had no power to make the appointment without them; and the court will presume that they have properly discharged their duty.—Then it is said that the allegation that the accounts in question were the plaintiff's accounts was not supported, inasmuch as the accounts themselves purported to be the "Overseers' accounts." The heading, however, was mere matter

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(b) By which it is enacted "that no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be

appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday during or immediately after divine service, and by affixing the same fairly written or printed on the principal door of such church or chapel."

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of form: the accounts were in fact accounts of the receipts and disbursements of the plaintiff; it was part of his duty to keep those accounts, and to pass and verify them on oath (c), for, the statute requires him to execute all such of the duties of the office of the overseer of the poor as should in the warrant for his appointment be expressed, in the like manner and as fully to all intents and purposes as the same might be executed by any ordinary overseer of the poor; and this was one of those duties.—The offence imputed to the plaintiff is at all events an indictable offence, and therefore, the words are libellous per se, and it is perfectly immaterial whether they related to the plaintiff's character of assistant overseer or not—*May v. Brown*, 3 B. & C. 138; *Lewis v. Waller*, 3 B. & C. 138, n.

Storks, Serjeant, and *Palmer*, in support of the rule.—The plaintiff has in his declaration alleged that he was appointed (which must in law be held to mean *duly* appointed) assistant overseer; and the plea distinctly traverses that allegation: the plaintiff therefore was bound to prove it; and he could only prove a due appointment by shewing that a vestry was properly held in pursuance of the 58 Geo. 3, c. 69, s. 1, that he was, under the 59 Geo. 3, c. 12, s. 7, nominated and elected by the vestry assembled, that his duties and salary were determined and fixed, and that, being so nominated and elected by the vestry, he received his appointment by warrant under the hands and seals of two justices of the peace. In all these preliminary and necessary steps the plaintiff's proof was defective. In *Moises v. Thornton*, 8 T. R. 303, the plaintiff having alleged that he was a physician, and had duly taken the degree of doctor of physic, it was held that the allegation was not sustained by the mere production of a diploma under the seal of one of the universities. [*Tindal*, C. J.—

(c) See the statutes 17 Geo. 2, c. 38, s. 1, and 50 Geo. 3, c. 49, s. 1.

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Suppose in that case the diploma had been duly proved, could it be contended that the plaintiff would be bound to shew that all the preliminary steps necessary to the obtaining the diploma had been properly taken? Probably not. Buller, J., in *Pickford v. Gutch*, 2 Starkie on Slander, 573, 8 T. R. 305, n., ruled that evidence of a party having acted as a physician would not suffice in support of an allegation that he had used and exercised the profession &c. of a physician. With respect to *Berriman v. Wise*, Chambre, J., in *Smith v. Taylor*, 1 New Rep. 196, where this point was very much discussed, says: "The case of *Berriman v. Wise* was a relaxation of the rules of evidence, though perhaps, under the special circumstances, well warranted. There, the words spoken were spoken of the plaintiff as attorney in a particular cause, and, being a threat to have him struck off the rolls, amounted to a distinct acknowledgment of his professional character as an attorney. Indeed, the court proceeded entirely upon that ground(d)." Here the plaintiff's official character is not admitted on the record; but, on the contrary, a direct issue is tendered upon it.—The accounts were headed and passed as the accounts of the overseers, not of the plaintiff; they contained all the receipts and disbursements connected with the office of overseer. The assistant overseer is no where required to verify these accounts on oath; and the libel must be intended to have reference, not to a mere voluntary oath, but to a judicial oath—one that the party is required or authorized by law to take. [*Tindal*, C. J.—The overseer is bound to verify his accounts on oath; and the assistant overseer is authorized and impowered by the act to execute all such of the duties of the office of overseer as should be expressed in the warrant for his appointment (and this was one of them), in like manner and as fully as the same might be executed by the general overseer.]—The al-

(d) And see *Green v. Jackson*, Peake, 236.

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legation that the plaintiff was appointed assistant overseer and that the libel was published of him in that character, cannot be rejected as surplusage: it is indivisible, and must be proved as made. Where a particular meaning is by an innuendo or colloquium given to the words of a libel, the plaintiff is bound to prove them accordingly. "If the plaintiff," says Bayley, J., in *May v. Brown*, 3 B. & C. 113, "in stating the libel, had connected it by innuendo with a particular allegation, then he would be bound to prove a libel relating to the matter contained in that allegation." So, in *Sellers v. Till*, 4 B. & C. 655, 7 D. & R. 121, where the declaration stated that the plaintiff was treasurer and collector of certain tolls, and that the defendant spoke of and concerning the plaintiff, as such treasurer and collector, certain words, "thereby meaning that the plaintiff, as such treasurer and collector," had been guilty of the misconduct imputed to him; it was held that the plaintiff was bound to prove that he was such treasurer and collector. In *Williams v. Stott*, 1 C. & M. 687, Bayley, B., says: "You may reject, on demurrer, or on motion in arrest of judgment, an innuendo which is not warranted by the preceding allegations in the declaration; and all the cases which have been cited by the plaintiff's counsel are cases of this description. But the question here is, whether you may reject at the trial an innuendo which is good upon the face of the declaration. By such an innuendo the plaintiff makes it part of his case that the alleged slander bears the peculiar character which he assigns to it; and I know of no instance in which it has been held that you may separate the words themselves from the explanation which the plaintiff has given to them."

TINDAL, C. J.—I am of opinion that the rule for entering a nonsuit in this case ought to be discharged. The ground upon which the rule was obtained is, that the issue raised on the plea to the first count has been virtually found for the defendant, that is, that the allegation in the

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count which that plea traverses has not been supported by the evidence. The allegation is, that the plaintiff *had been appointed* and *was* assistant overseer of the parish of West Rudham, in the county of Norfolk, and had made out and passed certain accounts of *him the said plaintiff as such assistant overseer* as aforesaid, the same containing (amongst other things) an account of the receipts and disbursements of the plaintiff as such assistant overseer, and which said accounts so made out, the plaintiff, before &c., had verified on the oath of him the said plaintiff. The plea is a distinct traverse or denial of this allegation. The objections arising out of this traverse are two—first, that there was no proof that the plaintiff had been duly appointed assistant overseer, as alleged in the count—secondly, that the plaintiff failed in proving that he passed and verified on oath his accounts as such assistant overseer.

1. As to the first point, the evidence consisted of a regular and formal appointment of the plaintiff to be assistant overseer of the parish, under the hands and seals of two magistrates. That appears to me to be a complete answer to the objection. All the authorities concur to shew that it was only necessary for the plaintiff to allege and to prove that he acted in the character and capacity of assistant overseer. But it has been contended, that, as the plaintiff has thought fit to go further, and to allege an appointment, he was bound to support that allegation by proof of an appointment good in omnibus. It appears to me, however, that the allegation in question, traversed as it is in the plea, amounts to no more than an allegation of an appointment *de facto*. The appointment by the magistrates is an act separate and distinct from the election by the vestry. If the defendant had intended to put in issue the fact of the election, he should have alleged that the vestry was not duly assembled or the election not duly made; and then probably the question might have been raised. But, if, upon a mere traverse of the appointment, the defendant

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were allowed to go into an investigation of all the circumstances that took place anterior to the appointment, the plaintiff would come to the trial totally unprepared to meet the objection. In *Moises v. Thornton*, where the declaration contained an averment that the plaintiff practised physic under a diploma, it was held to be satisfied by the production of a regular diploma bearing the university seal: the defendant never could have been permitted to contest the fact of the diploma having been duly obtained, or to shew that the university had broken through any of their rules in granting it: nothing was in issue between the parties but the mere fact that the plaintiff practised under a diploma: so, here, nothing was in issue but the mere fact that the plaintiff was acting as assistant overseer under an appointment by the magistrates. 2. Then, as to the objection that the accounts passed and verified by the plaintiff were not, as stated in the declaration, and traversed by the plea, the accounts of *the plaintiff*. It appeared that the accounts purported to be, and in fact were, the *overseers'* accounts; and they were so headed. I am far from saying that that was not the proper mode for a deputy to render accounts—in the names of his principals. It appeared, however, that all the receipts and payments had been made by the plaintiff in virtue of his office of assistant overseer. The mere circumstance of their being headed in the names of the overseers, would not render the accounts the less the plaintiff's accounts.—A third objection has been urged, viz. that the writing complained of is not libellous per se, for that the plaintiff could not be guilty of perjury, inasmuch as the oath alleged to have been taken by him was voluntary, and not required by any statute. The statutes 17 Geo. 2, c. 38, s. 1, and 50 Geo. 3, c. 49, s. 1, however, require the overseer to verify his accounts on oath; and the 7th section of the 59 Geo. 3, c. 12, authorizes and impowers the assistant overseer to execute all such of the duties of the office of overseer of

the poor as should be expressed in the warrant for his appointment, in like manner and as fully to all intents and purposes as the same might be executed by any ordinary overseer of the poor: and the verification of the accounts was one of the duties of the office which the plaintiff was by the warrant for his appointment required to perform.

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PARK, J., concurred.

GASELEE, J.—The justice of the case is clearly with the plaintiff: and, with one exception, I concur in what has fallen from the Lord Chief Justice. But I entertain some doubt as to whether the allegation that the plaintiff had made out and passed *his* accounts as assistant overseer, was made out by proof of the passing of the accounts produced, headed “overseers accounts.” Probably the more correct mode of stating the fact would have been, to state that the plaintiff, as assistant overseer, had performed all the duties of the office of overseer, and that he, as such assistant overseer, being the person by whom the accounts had been kept, passed and verified them.

Rule discharged.

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SHEE, on a former day, on the usual affidavit, obtained a rule nisi for judgment as in case of a nonsuit.

In answer to a rule for judgment as in case of a nonsuit, the plaintiff's attorney swore that *he* had not added the similitter, nor had it been added to his knowledge or belief:—Held, a sufficient answer.

Whately shewed cause, on an affidavit by the plaintiff's attorney which stated that the defendant having pleaded a set-off as to all but 5*l.*, and paid that sum into court; that, as to the set-off, the plaintiff replied that he was not indebted; and that to which the plaintiff replied in the ordinary form; but that no similitter had been added by the plaintiff's attorney, nor had it been added, to his knowledge or belief. He submitted, that, the cause not

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being at issue, the motion was premature.—*Gilmore v. Melton*, 2 Dowl. 632; *Brown v. Kennedy*, 2 Dowl. 639; *Seabrook v. Cave*, 2 Dowl. 691.

Shee, in support of the rule (admitting that the cases cited were not distinguishable from the present, provided the fact were as alleged), objected that it did not sufficiently appear upon the plaintiff's affidavit that the similiter had not been added, to countervail the distinct affidavit on the part of the defendant that the cause was at issue.

PER CURIAM.—The fact of the cause being at issue appears to us to be sufficiently negated; and consequently the rule must be discharged with costs.

Rule discharged.

Wednesday,
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REEVES and Another v. ELIZABETH WARD, Executrix
of DANIEL WARD, Deceased.

To a declaration on two promissory notes made by a testator, his executrix pleaded that she had not at the time of the commencement of the action, or at any time since, any goods or chattels which were of the testator at the time of his decease, in her hands as executrix to be administered—omitting the usual averment that she had fully administered. The

plaintiff in his replication took issue on the defendant's possession of assets:—Held, that, under this issue, it was competent to the defendant to give in evidence payments made by her before the commencement of the action, to exhaust the assets shewn to have come to her hands.

THIS was an action brought against the defendant as executrix of her late husband to recover the balance due on two promissory notes, the one for 30*l.*, the other for 33*l.* 4*s.* 2*d.*, made by the deceased and payable to the plaintiffs: 15*l.* had been paid on account. The defendant pleaded that she had not at the time of the commencement of the action, nor at any time since, had any goods or chattels which were of the said Daniel Ward at the time of his decease, in her hands as executrix to be administered. The plaintiffs replied, that, at the commencement of the action, and since, the defendant had divers goods and chattels which were of the said Daniel Ward at the time of his decease, in the hands of the defendant as executrix as aforesaid to be administered, of great value,

to wit of the value of the damages sustained by the plaintiffs.

The cause was tried before Vaughan, J., at the Sittings in London in Easter Term last. The evidence on the part of the plaintiffs fixed the defendant with the receipt of assets of the testator to the extent of 31*l.* 3*s.* 6*d.*, the net proceeds of the sale of the testator's furniture and effects. To countervail this, the defendant offered to prove payment of debts of the testator to a larger amount. For the plaintiffs, it was submitted that such evidence was not admissible as the plea stood. The learned judge admitted the evidence, reserving the point. The defendant then proved the following amongst other payments:—7*l.* for wages due to the son of the deceased; 8*l.* to one Taylor, for interest due upon a mortgage; 14*l.* to one Archard for money lent; and various other small sums for rent, rates, and taxes. She also claimed to retain 8*l.* for the funeral expenses of the deceased, and 10*l.* for probate duty, which had not yet been paid, the probate not having been obtained until after the commencement of the action. To prove the payment of the 14*l.* to Archard, a receipt signed by him was produced: the receipt bore date the 9th of December, 1835; but a boy, a son of the deceased, swore that he was present when the money was lent by Archard to his father, and also when it was repaid by his mother after his father's death, and that he saw the receipt given.

An application was made to amend the plea by adding that the defendant had fully administered; but the learned judge, doubting his power to allow the amendment, referred it to the court.

A verdict was found for the defendant.

Atcherley, Serjeant, in Easter Term, obtained a rule calling upon the defendant to shew cause why the verdict should not be entered for the plaintiffs for 31*l.* 3*s.* 6*d.*, or why the plaintiffs should not be at liberty to sign judg-

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ment non obstante veredicto, or why there should not be a new trial.—There are but three modes by which a party charged as executor can discharge himself, viz., by denying the character of executor, by denying the receipt of assets, or by pleading plene administravit or plene administravit præter. In the present case, the defendant has pursued neither of these courses: and the principal question is, whether the defendant can, under the form of plea she has adopted, prove payments before action brought in answer to the admitted fact of the receipt of assets by her.—The plaintiffs are at all events entitled to judgment non obstante veredicto. The objection is not a mere technical one: it goes to the substance; for, if such evidence be admissible as the record now stands, a plaintiff can never be prepared to meet the defence set up. The evidence, too, as to these payments was very equivocal; the parties to whom they were made were most of them relatives of the deceased, and the circumstance of the receipt given by Archard bearing date in December, 1835, which has not yet arrived, shews that it was made up for the occasion. And with respect to the funeral expenses and charge for the probate, the former was not allowable, and the latter is yet unpaid.

Bere shewed cause.—With the exception of the introductory matter, the plea is the same as is to be found in all the books. Under the issue tendered by it, the defendant could only succeed by shewing that she had fully administered. The omission of the allegation that the executor or administrator has fully administered, is perfectly immaterial; for, issue is never taken upon that fact, but always upon the receipt of assets. Indeed, the authorities shew that it is more correct to omit the allegation of plene administravit. In *Noel v. Nelson*, 2 Wms. Saund. 220 a, n. (3), Mr. Serjeant Williams says: “The words ‘that they have fully administered the goods, &c.,’ seem to be superfluous. The more formal and correct way of pleading ap-

pears to be 'that they have no goods or chattels,' &c., omitting the preceding words, 'that they had fully administered.' " And this is not contradicted by the later editors of that work, who observe: " It seems rather too broadly asserted that the more correct way of pleading is to omit the words 'that they have fully administered.' It is true that it would in general be sufficient to plead 'that they have no goods, &c.:' but, in the case of an executor of an executor, it is necessary for the plea to state 'that the first executor fully administered;' at least it is necessary to plead by some form of words that he did so—*Wells v. Fyde*, 10 East, 315; and no other words seem so apt; in such case they are clearly operative words, and in the ordinary case they seem at any rate not to be incorrect; besides, the old precedents will all be found to contain them." And in Williams's Executors, Vol. 2, pp. 1211, 1212, it is said: " If an executor or administrator pleads plene administravit, and the plaintiff replies that the defendant has assets, whereupon issue is joined, the burthen of proof lies upon the plaintiff, who must prove that assets existed or ought to have existed in the hands of the defendant at the time of the writ sued out. And if upon the issue of plene administravit it shall appear that the executor or administrator has been guilty of a devastavit, which has caused a failure of assets, the jury must find that the defendant has assets to that amount, and not find a devastavit." In *Newton v. Richards*, 4 Mod. 297, the plea was in the same form as the present: it is in fact substituted for the old plea of *riens entre mains*.—The plaintiffs are clearly not entitled to judgment non obstante veredicto. In Tidd's Practice, 9th edit. 922, it is said: " The distinction between a replader and a judgment non obstante veredicto seems to be this: that, where the plea is good in form, though not in fact, or, in other words, if it contain a defective title, or ground of defence, by which it is apparent to the court, upon the defendant's

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own shewing, that, in any way of putting it, he can have no merits, and the issue joined thereon be found for him, there, as the awarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment non obstante veredicto: but, where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, then, for their own sake, they will award a repleader. A judgment therefore non obstante veredicto is always upon the merits, and never granted but in a very clear case." Neither are the plaintiffs entitled to a new trial. The issue being the same as the plea had been in the form suggested, there is no pretence for saying that the evidence given of the payments was a surprise upon them. *Lister v. Mundell*, 1 B. & P. 429, shews how strict the courts are in such cases.

[The affidavit of Archard was produced, in which it was sworn that the deceased was indebted to him, Archard, in the sum of 14*l.* for money lent, and that, on the 9th December *last*, the executrix paid him that sum.]

Atcherley, Serjeant, shewed cause.—The plea is not warranted by any of the precedents. In *Newton v. Richards*, the whole plea is not set out, and the point that now arises was not argued. At the present day, when the judges are anxiously framing rules to compel parties so to shape their pleadings that their opponents may know what is the precise nature of the defence intended to be set up, and so come prepared to meet it, it would be not a little singular now for the first time to permit such a plea as this, calculated as it is to lead the plaintiffs astray, to be put upon the record. Besides, the plea does not state that the defendant never had assets, but merely that she had them not at the time of the commencement of the action, nor at any time since. Such a plea was held in-

sufficient in the Year Book, 7 H. 4. 39: though the doctrine there laid down received some qualification in *Gewen v. Roll*, Cro. Jac. 132. If the plea be good, it must be so on the ground of its meaning that the party never had any assets. It is true that the replication to a plea of plene administravit always takes issue on the possession of assets: but the allegation that the defendant has fully administered shews what is meant; it makes the defence intelligible, and prevents the plaintiff from being taken by surprise. Under this form of plea, evidence of payments was clearly inadmissible. And many of the alleged payments were not allowable at all: the receipt for the 14*l.* said to have been paid to Archard ought not to have been admitted to confirm the improbable statement of the boy; the 10*l.* claimed for the probate, which had not been taken out at the time the action was brought, ought not to have been given credit for; [*Tindal*, C. J.—That the executrix was bound to pay]; the 8*l.* for the funeral of an insolvent man was unreasonable. [*Tindal*, C. J.—Of that the jury were the judges.] The rule upon this subject is laid down in Buller's *Nisi Prius*, 143, where the limit is said to be 5*l.*; and also in Selwyn's *Nisi Prius*, 8th edit. p. 780. n. (18); and was considered in *Hancock v. Podmore*, 1 B. & Ad. 260.

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TINDAL, C. J.—This rule comes before us upon three grounds—first, the plaintiffs seek to enter up judgment non obstante veredicto—secondly, to enter a verdict for the amount of assets admitted to have come to the defendant's hands, on the ground that evidence of payments was improperly admitted in discharge of those assets—thirdly, for a new trial, partly on the ground of the verdict being against evidence, and partly on affidavits, suggesting surprise. Upon neither of these grounds do I see any reason for disturbing the verdict. 1. The ground upon which the first point is put in argument is this: The action is

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brought against the defendant as executrix; and she has not in the ordinary form pleaded that she has fully administered, and had not at the time of the commencement of the action, or at any time since, had any goods and chattels which were of the testator at the time of his decease in her hands to be administered; but has omitted the first allegation, that she had fully administered. It appears to me that the short answer to this objection is, that the plaintiff has thought fit to join issue on the plea as it stands—on that which is the material and substantive part of the plea, whatever be its form. Whether or not the plea would be bad on special demurrer, we are not now called upon to decide: it is enough for the occasion to say that the point is first raised after a verdict for the defendant upon a traverse of the substantial part of the plea. *Hewlet v. Framingham*, 3 Lev. 28, is an authority to shew that a plea of *plene administravit* alone is ill (a): but I am not aware of any case where the omission of those words has been held to vitiate the plea. The nature of the judgment non obstante veredicto, and the ground upon which it proceeds, is this, that the defendant's plea, if proved or admitted, does not avail as a defence to the action. But it would be strange to say, that, when an issue has been joined on a substantial part of the defendant's plea, and a verdict has been found for the defendant upon such issue, the plaintiff is nevertheless entitled to a verdict in his favour—that, where an executrix has pleaded that she had not at the time of the commencement of the action, nor at any time since, had any goods of the testator in her hands as executrix to be administered, and issue taken thereon, and found for the defendant, the plaintiffs are still entitled to judgment. 2. The next ground is, that the plea did not admit of the evidence offered. That objection is almost answered by the consideration as to the form of the

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(a) And see *Bracebridge v. Baskerville*, 1 Leon. 68.

plea. It may be further answered by this, that, if the plea had contained, as it is contended it ought to have done, an allegation that the defendant had fully administered, inasmuch as no issue could be taken on that allegation, the plaintiffs would still go to trial in precisely the same position as if those words had not been found in the plea. Neither more nor less evidence would have been required to sustain the plea. It is every day's practice, on an issue joined on the fact of the defendant's possession of assets, to give evidence of payments. How can the plaintiffs say they were taken by surprise, when they must have come to the trial prepared to meet precisely the same evidence whether the plea was in the one form or the other? The meaning of the plea is, that the defendant had no goods or chattels of the deceased, at the time of the commencement of the action, or since, undisposed of in the proper course of distribution. 3. As to that part of the rule which has reference to a new trial—The defendant's son swore that he was present when Archard lent his father the money, and also when his mother repaid it after the death of his father. To confirm the boy's statement the receipt was produced. I am ready to admit, that, if the receipt had not been given at the time, and in the presence of the boy, it would not have been admissible to confirm his testimony. But we ought to see distinctly that this objection was taken at the trial. I see no reason for doubting the truth of the witness's statement; particularly as it is confirmed by the affidavit of Archard, who has sworn that the 14*l.* were paid to him on the 9th December, 1834. Then, if that 14*l.*, and the 8*l.* for the funeral, and 10*l.* for the probate, be deducted from the assets confessed, they alone would suffice to reduce the sum in dispute between the parties to a less amount than 20*l.*; and therefore the case would fall within the general rule, that, where the matter in dispute is of less value than 20*l.*, and there is nothing perverse in the verdict, a second trial will not be granted on the ground of the balance of evidence being the other way.

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PARK, J.—I am of the same opinion. The principal question arises on the validity of the plea after verdict; for, whether or not it would be objectionable on special demurrer, we are not now called upon to determine. As the plaintiffs have thought fit to take issue on the plea as it stands, and no issue could by possibility have been taken upon the allegation that is omitted, had it been inserted, the verdict has passed upon the only issue that could have been presented to the jury, and therefore I am not disposed to interfere. Mr. Serjeant Williams, in his note to the case of *Noell v. Nelson*, 2 Wms. Saund. 220 a., distinctly says that the words in question are superfluous: and this opinion is not combated by the later editors of that highly valuable work, who admit the words to be unnecessary, though they seem to think it better to insert them. That a devastavit might be shewn under an issue taken on a plea framed like the present, appears from the passage cited from Williams's Executors, and from *Newton v. Richards*. Where, then, is the hardship on the plaintiffs? I see none; for, the course of the evidence is in no degree varied. The credit due to the statement of the defendant's son was submitted to the jury: they believed it; and the affidavit of Archard now produced puts the matter beyond doubt.

GASELEE, J.—The plea in this case is not framed according to the general and antient course of the precedents: but still I think the authorities that have been cited shew the allegation, the absence of which is complained of, not to be material or necessary. It struck me at first that the want of such an allegation might prevent the proper application of the evidence to a devastavit: but I feel that difficulty removed by the passage cited from Williams's book on Executors. I incline therefore to agree with the note in Saunders. This precise point did not arise in *Newton v. Richards*. That was a *scire facias*, and the question was whether the general plea was suffi-

cient, or whether the defendant should not have gone on to allege how he had administered, so as to shew that no claims of an inferior degree had been satisfied before the commencement of the action. At all events, the objection if available at all, should have been taken on special demurrer. Judgment non obstante veredicto can only be entered where the issue has been taken on a point that is immaterial. How can the issue here taken be said to be immaterial, when it is taken upon the very point upon which it must have been taken even had the plea been framed upon the model suggested on the part of the plaintiffs?

Rule discharged.

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LINLEY v. BONSOR.

Wednesday,
Nov. 11th.

ASSUMPSIT for goods sold and delivered between November, 1827, and June, 1828. The action was commenced on the 7th July, 1835. The defendant pleaded the statute of limitations. At the trial before Parke, B., at the last Assizes for Yorkshire, to take the case out of the statute, the plaintiff relied upon certain letters written by the defendant to the plaintiff within six years, which were said to contain an acknowledgment of the debt; and also upon a part payment. It appeared that the defendant had executed an assignment of his effects for the benefit of his creditors, who were to receive a certain composition upon the amount of their respective debts. The plaintiff

To take a case out of the statute of limitations, the plaintiff gave in evidence letters wherein the defendant stated that he would have nothing to do with the plaintiff's claim, that he wished he would make him a bankrupt, and that he would rather go to gaol than pay the plaintiff in preference to others of his creditors who

had executed a composition deed. The Judge left it to the jury to say whether the letters contained an acknowledgment of the debt, telling them, that, to entitle the plaintiff to recover, it must be such an acknowledgment whence a promise to pay could be inferred. The jury having returned a verdict for the defendant.—The court declined to disturb it, holding the direction to be proper.

To shew a part payment within six years so as to bring the case within the exception in the statute, the plaintiff proved a payment of a portion of his demand by one F., the trustee under a deed of composition, who was expressly instructed to make the payment as a full satisfaction, instead of which he handed the money over as a part payment, and took a receipt accordingly. This payment so made was expressly repudiated by the defendant:—Held, that this was not a payment within the exception.

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had been requested to sign the deed, but declined to do so. Being at a subsequent period pressed by the plaintiff for payment of his demand, the defendant, on the 11th February, 1831, addressed him a letter containing the following:—

“ You know I gave up all my affairs, and therefore I consider I have nothing to do with your claim, nor shall I. I wish you would make me a bankrupt: this is in your power.”

A person named Fox, a trustee named in the deed, as the agent of the defendant, and being instructed by him to pay the plaintiff the amount of the composition in full satisfaction and discharge of his debt (the amount of which did not appear on the face of the composition deed), handed over the money to the plaintiff, who received it as *part payment*, and gave a receipt accordingly. The defendant never assented to this payment, but, on the contrary, expressly dissented. And, in answer to a further solicitation on the part of the plaintiff, the defendant, on the 7th October, 1834, wrote to him as follows, the plaintiff having in the meantime arrested him:—

“ I regret the inconvenience you have put me to by the arrest. You know I gave up every thing in Paradise Street, and that you have had the same as the rest. Why should I pay you in preference to those who have executed the deed? I had rather go to jail than do so.”

These were the letters constituting the acknowledgment, and the part payment upon which the plaintiff relied.

The learned Baron left it to the jury to say whether the letters above set forth contained on the face of them an acknowledgment of the debt; telling them, that, to entitle the plaintiff to recover, it must be such an acknowledgment whence a promise to pay could be inferred; and whether the part payment by Fox had been acknowledged or acquiesced in by the defendant. The jury returned a verdict for the defendant.

Heaton, in Easter Term, obtained a rule nisi for a new trial, on the grounds of misdirection and that the verdict was against evidence.—He submitted that it should have been left to the jury to say, not whether the letters contained an acknowledgment sufficient to warrant the inference of a promise to pay the debt, but merely whether they contained an acknowledgment of the existence of a debt at the time they were written; for that, if they found an unconditional and unqualified acknowledgment, the law would thence infer the promise; and that the whole current of authorities shewed that any acknowledgment, however slight, would suffice to take a case out of the operation of the statute.

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Alexander and Hoggins shewed cause.—Formerly, it is true, any acknowledgment, however slight and equivocal, was held sufficient to take a case out of the statute: but the later cases shew that, to warrant the inference of a promise to pay, the acknowledgment of the debt must be distinct and unequivocal—*Tanner v. Smart*, 6 B. & C. 604, 9 D. & R. 549; *Fearn v. Lewis*, 6 Bing. 349, 4 M. & P. 1; *Kennett v. Milbank*, 8 Bing. 38, 1 M. & Scott, 102. In the present case, the letters contain nothing that can reasonably be construed to import a promise to pay otherwise than under the composition deed or through the medium of a bankruptcy. The payment relied upon as a part payment to take the case out of the statute, cannot be held to have that effect, inasmuch as it was not sanctioned by the defendant.

Wightman and Heaton, in support of the rule.—The acknowledgment being unequivocal, the law implies a promise. In *Fearn v. Lewis*, the letters contained nothing more than a conditional promise, to pay when of ability; and in *Kennett v. Milbank* there was no admission that the party was indebted. In *Tanner v. Smart*, Lord Ten-

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terden says: "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied." The only question is, whether the acknowledgment is unequivocal, and unclogged with condition: the late statute, 9 Geo. 4, c. 14, has not in any degree altered the effect of the acknowledgment, but only the mode of proof—*Dabbs v. Humphries*, 10 Bing. 446, 4 M. & Scott, 285. The precise amount of the debt is not stated on the face of the letters; but it sufficiently appears to have been of an amount large enough to ground a fiat in bankruptcy against the defendant: and the amount may be shewn aliunde—*Letchmere v. Fletcher*, 1 Cr. & M. 623.—In assumpsit it is never necessary to prove a promise: it is enough to shew the duty out of which the contract or promise to pay arises; and that form of action was scarcely known at the time of the passing of the 21 Jac. 1, c. 14.—As to the part payment—the letter of the 7th October, 1834, contains a recognition of the act of the trustee in making the payment on the defendant's account. At all events it amounts to an acknowledgment of the debt by an authorized agent of the debtor.

TINDAL, C. J.—The only question here is, whether the direction to the jury was correct or not. I am of opinion that it was substantially so. The point arises on the 9 Geo. 4, c. 14, and the question is whether the letters relied upon to take this case out of the statute contain an acknowledgment or promise sufficient to have that effect. The words of the act are: "no acknowledgment or *promise* by words only shall be deemed sufficient evidence of a new or continuing promise," &c. Now, one can very well understand what is meant by a promise. The letters contain nothing like a promise to pay. If there had been a distinct promise to satisfy the plaintiff's demand either under the composition deed or under a fiat, and in no other way, that would not have taken the case out of the

statute. Then, do the letters contain an acknowledgment of the debt. A distinct and unequivocal acknowledgment seems to me to have the same effect as a promise, because the law will thence imply a promise. But, where the acknowledgment is conditional only, or in direct opposition to a promise, how can a promise be implied? Why should the effect of an acknowledgment be greater than that of a promise? Although many of the older cases to which our attention has been invited have held that which in common sense would be called a direct denial of the debt to amount to such an acknowledgment as to warrant the inference of a promise to pay; and in others, an acknowledgment of the debt accompanied with a refusal to pay, has been held to have the same operation; since the case of *Tanner v. Smart*, those old cases are no longer law. It seems to me that the learned baron was fully warranted in telling the jury that the acknowledgment, to have the operation contended for by the plaintiff, must be such an acknowledgment as would warrant an inference of a promise to pay. It is somewhat late now for the first time to contend that the action of assumpsit is not within the statute of limitations. If any doubt could ever have been entertained on that point, the 9 Geo. 4, c. 14, s. 1, sets it at rest.—Then, as to the part payment relied on to take the case out of the operation of the act. The proviso in the statute is, that “nothing therein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever.” That means, a payment made by the party or by some one acting under his authority; not a payment by a stranger. The question upon this part of the case is, whether the payment here was a payment made under the authority of the defendant. The facts were these:—The defendant had entered into a composition with his creditors. Fox, the trustee under the deed, as the agent for this purpose of the defendant, was employed to tender to

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the plaintiff the proportion payable to him under the deed: he had no authority to pay the money other than as a satisfaction of the plaintiff's entire demand. The plaintiff received the money as a part payment. But this was never acquiesced in by the defendant. On both grounds, therefore, I think this rule must be discharged.

PARK, J., was at chambers.

GASELEE, J.—I am of the same opinion. Perhaps there is no point upon which the authorities are so conflicting as upon the construction of the statute of limitations. On one occasion a positive refusal to pay was held to be a sufficient acknowledgment to take the case out of the statute (a): and many other decisions on the subject were almost equally repugnant to common sense. The tide of authorities, however, changed about the time I first came into this court (b): the courts began to require the acknowledgment to be such as to justify them in inferring a promise to pay. The acknowledgment under the late act must be the same, the act in addition requiring it to be in writing. Was the acknowledgment in the present case one capable of bearing such a construction? So far from implying a promise to pay, it in my judgment implies a distinct denial of the party's liability.—The payment that Fox was authorized to make on behalf of the defendant, was a payment in accordance with the terms of the deed—in satisfaction and discharge of the entire claim. A payment made in direct contravention of that authority clearly cannot be held to bind the defendant as a part payment so as to deprive him of the benefit of the statute.—Then it is said the case was not properly left to the jury. It appears to me, however, that the way in which it was left amounts pretty much to that in which

(a) A'Court v. Cross, 3 Bing. 329, 11 Moore, 198.

(b) Trinity Term, 1824.

it is contended it ought to have been left. The plaintiff can hardly except to the opinion of the judge because he did not nonsuit him. Upon the whole I see no reason for disturbing the verdict.

Rule discharged.

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SHARP v. JOHNSTON.

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Nov. 12th.

THE defendant was, on the 29th of July last, arrested at the suit of the plaintiff, for 500*l.* due on a bill of exchange, upon an affidavit of debt headed "In the Common Pleas," and the jurat of which was as follows:—"Sworn at Athlone, in the county of Roscommon, this 21st July, 1835, before me, a commissioner for taking affidavits in said court of Common Pleas in said county, and I know the deponent. John Gaynor, Commissioner." In the course of September, application was made to Bosanquet, J., at chambers, to discharge the defendant out of custody upon filing common bail, on the ground that John Gaynor was not a person qualified to take affidavits for the court of Common Pleas at Westminster. The application was founded upon affidavits which stated (amongst other things), that, at the request of the defendant's attorney, search had been made at the chambers of the Lord Chief Justice, by one of his lordship's clerks, for the purpose of ascertaining whether John Gaynor, of Athlone, in the county of Roscommon, was duly appointed a commissioner for taking affidavits in this court; and that the clerk accordingly made such search, and informed the attorney that the name of Gaynor did not appear in the list of commissioners for taking affidavits in this court. The learned judge refused to entertain the matter, on the ground of the lateness of the application.

Where an affidavit to hold to bail is sworn in Ireland before a commissioner for taking affidavits to be used in the Irish courts, his signature and authority to administer an oath must be verified by affidavit.

Quære, whether an affidavit sworn before such a commissioner (he not being a commissioner for taking affidavits to be used in the English courts, under the 3 & 4 Will. 4, c. 42, s. 42), is good at all.

Hurlstone, on the first day of this term, made the like motion in court.—In addition to the affidavits used on the

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application at chambers, he produced an affidavit wherein the defendant's attorney deposed that he addressed a letter to John Gaynor, Athlone, requiring to know whether there were in Athlone any commissioners for taking affidavits in the courts of England; in answer to which he received the following: "Athlone, September 31st, 1835. In reply to your letter, I beg to inform you that there is not in Athlone any commissioner for taking affidavits in any of the courts in England.—P. S. I am commissioner for all the Irish courts. John Gaynor." The handwriting of Gaynor in the jurat of the affidavit, and also in the above letter, were identified in an affidavit made by the defendant, in which he stated that *he obtained a day rule from the warden of the Fleet, on Tuesday, the 2nd November instant*, and called at the office of the filacer, and at the chambers of Bosanquet, J., for the purpose of examining the affidavit and letter. Upon the affidavits, *Hurlstone* submitted that it appeared with sufficient certainty that Gaynor was not a commissioner for taking affidavits to be used in this court in pursuance of the statute (a); that, if he were so, that fact should have appeared in the jurat—*Howard v. Brown*, 1 M. & P. 22; and that, even if the affidavit had been sworn before a judge in Ireland, his signature must have been verified by affidavit.

(a) 3 & 4 Will. 4, c. 42, s. 42, which, reciting that "it would be convenient if the power of the superior courts of common law and equity at Westminster to grant commissions for taking affidavits to be used in the said courts respectively should be extended," enacts "that the Lord High Chancellor, lord keeper, or lords commissioners of the Great Seal, the said courts of law, and the several judges of the same, shall have

such and the same powers for granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said courts respectively, as they now have in all and every the shires and counties within the kingdom of England, and dominion of Wales, and town of Berwick-upon-Tweed, and the Isle of Man, by virtue of the statutes now in force."

Another ground urged in support of the motion was, that proceedings had been taken in Scotland for the recovery of the same debt; the defendant being entitled to certain freehold property there on the death of his father. These proceedings consisted of letters of horning, the effect of which is to entitle the plaintiff or pursuer, at the expiration of six days from the proclamation or "charge of payment," to issue letters of caption for the arrest of the defendant; and also of what is called an "inhibition" recorded against the defendant in the Register Office in Edinburgh, the effect of which was stated to be the same as a judgment, operating as a charge upon his estate. *Naylor v. Eagar*, 2 Y. & J. 90, was cited. There the court of Exchequer seem to have been of opinion, that, where, under process from the Supreme Court of New South Wales (established by the 4 Geo. 4, c. 96), the goods of a defendant are attached and rendered to the plaintiff in execution, or bail are put in to pay the condemnation money, he cannot be arrested for the same cause of action in this country.

TINDAL, C. J.—The defendant was not actually arrested in Scotland. A judgment recovered there only operates as a simple contract debt here (*b*). The defendant in this case could not plead in abatement that another action was depending in the court of Session for the same cause. The rule may go upon the first ground, but not upon this.

W. H. Watson, contra, objected that the defendant's affidavit did not disclose his place of abode; citing *Lawson v. Case*, 2 Dowl. 40, where an affidavit made by a defendant in a cause was rejected for want of the addition of the deponent, pursuant to the rule of Hilary Term, 2 Will. 4, s. 5.

(*b*) It may form the foundation of an arrest here, under a judge's order.

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A defendant may be held to bail in this country, notwithstanding proceedings had for the same cause of action in Scotland—such proceedings not enuring to deprive the party of liberty there, and the debt being unsatisfied.

Where it appears by an affidavit in support of a motion that the deponent (the defendant in the action) is in the Fleet prison, his place of abode need not be stated.

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Wilde, Serjeant.—It appears from the affidavit that the deponent is a prisoner in the prison of the court, applying to the court for his discharge from custody; and is a lieutenant in the army, having no domicile. The general rule, therefore, the object of which is the more perfect identity of the party making the affidavit, can have no application to a case like the present; for, the plaintiff has identified him. To ask a party his domicile when the court has him in its grasp, savours of absurdity. In *Jackson v. Chard*, 2 Dowl. 469, it was held to be unnecessary to give the addition of a deponent so circumstanced.

TINDAL, C. J.—I am for adhering in all cases as closely as possible to the words and spirit of the rules for the assimilation of the practice of the several courts in Westminster-Hall; therefore, unless it appeared very clearly to me that this is an excepted case, I should hold that the affidavit could not be read. But, when I find that the affidavit shews the deponent to be a prisoner in the custody of the Warden of the Fleet, at large on a day rule, I think he is described with sufficient particularity.

The rest of the court concurring—

W. H. Watson proceeded to shew cause.—He produced affidavits alleging that no list of the commissioners appointed under the late act was kept at the chambers of the Chief Justice, other than a list of the parties who had paid certain fees payable upon their appointment.—He submitted that the object of the late provision was to afford additional facilities to suitors, not to render inadmissible affidavits sworn before parties who before the passing of the act were authorized to take them—*Kilby v. Stanton*, 2 Y. & J. 75; *Ellis v. Sinclair*, 3 Y. & J. 273.—He also submitted that the application was too late: but this was answered by the remark that the affidavit was not merely irregular, but an absolute nullity.

TINDAL, C. J.—This matter may be disposed of on one short ground: either the party before whom the affidavit of debt was sworn is a commissioner duly appointed to take affidavits to be used in this court, or he is not. It has not been attempted to be shewn that he is such commissioner: but I think there is every reason for believing that he is not so, but is only a commissioner for the Irish courts. His signature and authority to administer an oath therefore ought to have been verified by affidavit.

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PARK, J.—The 3 & 4 Will. 4, c. 42, s. 42, certainly operates in extension of the power of the courts to grant commissions for taking affidavits to be used therein. But, even if the affidavit had been sworn before a judge in Ireland, his signature must be verified by affidavit (c); there ought therefore to have been at least an affidavit verifying the signature of Gaynor.

The rest of the court concurring—

Rule absolute (d).

(c) "If sworn before a judge in Ireland or Scotland, the judge's signature to the jurat must be verified by an affidavit to be made in this country; but, if sworn before any other person (other perhaps than a commissioner empowered under the recent act of 3 & 4 Will. 4, c. 42, s. 42), not only his signature to the jurat, but also his authority to administer oaths and take affidavits, must be verified in like

manner.—*French v. Bellew*, 1 M. & Sel. 302; *Omealey v. Newell*, 8 East, 364." Arch. Pr., by Chitty, 3rd edit. p. 113.

(d) Tindal, C. J., observed that in future an authenticated list of the commissioners appointed should be kept at the chambers of each of the Chief Justices and of the Chief Baron. Down to Easter Term, 1836, this resolution had not been put in practice.

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JOHNSTON v. KENNEDY.

Where a defendant is held to bail or detained by virtue of a judge's order, he is not bound to apply either to the same or to another judge at chambers, to rescind the order or to discharge him from custody, on the ground of defects in the affidavit of debt: the application is properly delayed till the court is sitting.

HURLSTONE, on a former day, obtained a rule nisi to set aside an order made by Patteson, J., on the 22nd October last, for holding the defendant to bail, and that the defendant might be discharged out of custody as to this action, on entering a common appearance, on the ground that the affidavit of debt was defective.

Busby shewed cause.—It appeared, that, on the 30th October, the day on which the time for putting in bail expired, a summons was taken out, returnable the next day, for the discharge of the defendant on the ground that the date of the order was not indorsed on the back of the writ of detainer, as required by the 2 Will. 4, c. 39, s. 8, Sched. Nos. 4 and 5. Williams, J., before whom the summons came on for hearing, declined to interfere, on the ground that the application was a day too late—*Tyler v. Green*, 3 Dowl. 439. The objections to the affidavit not having been mentioned when the parties were before Williams, J., at chambers, it was contended that it was now too late to take advantage of them. The affidavit was admitted to be irregular.

Hurlstone, in support of his rule, submitted, that, to have taken those objections before Williams, J., would have been virtually asking him to rescind the order of Patteson, J., which would have been equally indecorous and contrary to the usual course of practice at chambers.

TINDAL, C. J.—I think the defendant has pursued the proper course. It would have been appealing to one judge against the decision of another, to have asked Mr. Justice Williams to entertain objections to an affidavit upon which Mr. Justice Patteson had granted an order.

PARK, J.—It is not proper to ask one judge to interfere with the order of another, unless at his express desire. Whenever such an application is made to me, I invariably send the parties to the court. If it be near the term, I adopt the same course even if the order is my own.

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The rest of the court concurring—

Rule absolute.

EDWARDS v. BARNES and Another.

THE plaintiff was the purchaser, at a sale by auction, of certain ground rents arising out of certain lands, principally copyhold, but a small part freehold, situate at Brixton and Upper Tulse Hill, in the county of Surrey, sold by the defendants to the plaintiff on the 27th June 1834, on condition that the plaintiff should have a conveyance thereof at Michaelmas, 1834. This action was brought to recover from the defendants the sum of 723*l.* deposit in part of a sum of 4820*l.* purchase money, and 70*l.* 5*s.* 10*d.* auction duty, paid by the plaintiff, as purchaser of the said ground rents, to the defendants: and the breach assigned in the declaration was, that, at the time of such sale, and at the time when the said purchase ought to have been completed, the defendants had not nor could they procure any such title to the said copyhold premises from whence the said ground rents arose, or to the said ground rents, as enabled them to make to the plaintiff a valid and effectual conveyance of the said ground rents; whereby they were prevented from making to the plaintiff such conveyance as was stipulated for on the said purchase according to the said condition. The defendants pleaded, that, at the time of such sale, and at the time when the purchase ought to have been completed, they

Friday,
Nov. 13th.

A testator possessed of freehold, copyhold and leasehold property, devised to his wife, M. D., as follows:—
“All my freehold and leasehold, and all my money, securities for money, stock in government funds, goods, chattels, and all other my property whatsoever and wheresoever, to hold the same unto and for the use of my said wife M. D., her heirs, executors, administrators, and assigns forever:—Held, that the copyhold passed under this devise.

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had and were able to procure such a title to the said ground rents, and to the copyhold premises from whence the said ground rents arose, as enabled them to make to the plaintiff a valid and effectual conveyance thereof according to the said condition: whereupon issue was joined.

The facts were stated for the opinion of the court in a special case, as follows:—

In the year 1808, James Doubtfire, of Stoke Damarell, in Devonshire, was seised in fee of the said freehold premises, and was also seised in his demesne as of fee, according to the custom of the manor of Lambeth, of the said copyhold premises, of which manor the said copyholds were held; out of which said freehold and copyhold lands the ground rents in question issued. In 1810, he was admitted to the said copyholds, and at the same time surrendered the same to the use of his will. At the time of making his will hereinafter mentioned, he continued so seised of the said freehold and copyhold premises; and was also possessed of certain leasehold property situate in Muffet Street and Cross Street, City Road, in the county of Middlesex, at Brixton Causeway and Nelson Square, in the county of Surrey, and of a ground rent of 11*l.* per annum issuing out of a house in Nelson Square. He was not seised or possessed of any other lands or ground rents whatsoever.

Will of James
 Doubtfire.

Being so seised and possessed, on the 6th August, 1823, he made and published his last will and testament, in all respects duly executed for the purpose of passing freehold and copyhold estates, as follows:—"I give, devise, and bequeath unto my wife, Mary Doubtfire, all my freehold and leasehold, and all my money, securities for money, stock in government funds, goods, chattels, and all other my property whatsoever and wheresoever, to hold the same unto and for the use of my said wife, Mary Doubtfire, her heirs, executors, administrators, and assigns, for ever, subject nevertheless to the payment of nearly 60*l.* per annum

to my sister Sarah Hendey, of one annuity, arising from part of the ground rents payable to me out of my manor of Brixton, in the county of Surrey, and the other part out of the ground rents payable to me from Muffet Street and Cross Street, City Road—to hold the said annuity or sum of nearly 60*l.* yearly unto my said sister, Sarah Hendey, her heirs and assigns for ever. And I constitute and appoint my said wife, Mary Doubtfire, my sole executrix of this my last will and testament, hereby revoking all former wills by me made." In witness, &c.

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The said James Doubtfire died very shortly after making his said will, and the same was duly proved in the Ecclesiastical Court. There never was any such manor as the manor of Brixton. Previously to the making of the said will, no part of his freehold, leasehold, or copyhold property was subject to any annuity. At the time of the death of James Doubtfire, the ground rents payable to him out of his leasehold properties in Muffet Street, City Road, and at Brixton Causeway, amounted to 50*l.* a year; and no more, after deducting the sum of 1*l.* payable annually for ground rent in respect of the same; and the freehold lands at Brixton were worth about 10*l.* a year. After the death of the said James Doubtfire, Mary Doubtfire, his widow and devisee, entered into the receipt of the ground rents arising out of the freehold and copyhold premises at Brixton and Upper Tulse Hill, and continued in receipt thereof until the time of her death, and was admitted to the said copyholds, and, in May, 1824, surrendered the same to the use of her will. Subsequently to the death of the said James Doubtfire, by indenture made between the said Sarah Hendey (in the deed called Handy), of the one part, and the said Mary Doubtfire of the other part, and duly executed—after reciting that the said James Doubtfire never was possessed of the manor of Brixton, and that the messuages, tenements, and hereditaments in Muffet Street and Cross Street, in the will mentioned, and

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testator.

State of his pro-
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those in the will denominated as his manor of Brixton, and ground rents payable to him therefrom or thereout, and thereby intended by the said James Doubtfire to have been charged with the payment of the said annuity of nearly 60*l.* given by the will to the said Sarah Hendey, then produced the clear yearly rent of only 50*l.*; and that it had been agreed between the said Sarah Hendey and Mary Doubtfire, that Sarah Hendey should have and receive an annuity of 50*l.* and no more out of the several messuages and tenements thereafter particularly described, and which sum of 50*l.* was the full amount of the clear yearly ground rents payable in respect of the said premises—the said Sarah Hendey covenanted with Mary Doubtfire that she would take an annuity of 50*l.* out of certain leasehold premises therein described as situate in Muffet Street and Brixton Causeway, and as having been leased by the said James Doubtfire, in full discharge and satisfaction of the annuity given her by the will of James Doubtfire: and the said Sarah Hendey did thereby release all the other messuages, lands, tenements, hereditaments, estate, and effects of the said James Doubtfire from the payment of the same.

Will of Mary
 Doubtfire.

In the year 1834, the said Mary Doubtfire made and published her last will and testament in writing, in all respects duly executed for the purpose of passing freehold and copyhold estates, and thereby gave and devised all her freehold, copyhold, and leasehold messuages, lands, hereditaments, and real estates, to John Knapman and James Doubtfire, otherwise Knapman, and the survivor of them, and the heirs of such survivor; and died shortly after without altering or revoking her said will. The defendants sold the said ground rents to the plaintiff by the direction and authority of the said John Knapman and James Doubtfire, otherwise Knapman.

Question.

The question for the opinion of the court was, whether or not the said copyhold property situate at Brixton and

Upper Tulse Hill passed by the devise thereof in the will of James Doubtfire to his widow Mary Doubtfire.

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Bayley, for the plaintiff.—The copyhold property of the testator did not pass by the will in question. The only point of contention will be whether the words “other property” are sufficient, as used in this will, to pass freeholds or copyholds; for, it may be conceded, that, under certain circumstances, such property will pass under the general words “property,” that is, provided such appears upon the face of the will to be manifestly the intention of the testator. In *Dally v. King*, 1 H. Bl. 1, where in a devise the words “estate of what kind soever” were immediately preceded and followed by particular descriptions of personal property, the court inclined to think that they did not pass real property. In *Bailis v. Gale*, 2 Ves. sen. 51, Lord Hardwicke says: “It has been held, that, where *estate* is mentioned generally, accompanied with personal things, it should be restrained to personal: but never where *real estate* is mentioned; for, then the personal things mentioned shall be considered only as an enumeration of those specific things.” In *Timewell v. Perkins*, 2 Atk. 102, Fortescue, J., says: “The word *estate* itself indeed may include as well real as personal; yet, when the testator has expressed himself by such words as are applicable to *personalty* only, I cannot intend he meant the real estate.” In *Doe d. Bunny v. Rout*, 7 Taunt. 79, 2 Marsh. 397, a bequest of “all my stock in trade, household goods, wearing apparel, ready money, securities for money, and every other thing my property, of what nature or kind soever,” was held not to carry land, being controlled by indications which rendered the testatrix’s intent uncertain. Gibbs C. J., in that case adopts the doctrine laid down by Sir James Mansfield in *Doe d. Helling v. Yeud*, 2 N.R. 214—“In cases between the heir and the devisee, the question is, not whether the heir can prove that the testator did not

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intend to pass real property, but whether the devisee can prove that he did. The proof lies on the devisee. The common expression, that an heir shall never be disinherited except by express words, or such as have a necessary implication, is incorrect (*Gardner v. Sheldon*, Vaugh. 262, 263), and is well expressed by Lord Chief Justice Willes in the case of *Moone d. Fag v. Heaseman*, Willes, 141, who, after shewing that the rule is inconsistent with a variety of cases, says, but the rule is that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited." Here, the testator specifically disposes of freehold and leasehold property. He was not ignorant that he possessed copyhold: and the habendum shews that the copyhold was not intended to pass; for, the words used are not adapted to carry such an intention into effect. The sentence consists of two members only—first, "all my freehold and leasehold"—secondly, "all my money, securities for money, stock in government funds, goods, chattels, and all other my *property* whatsoever and wheresoever." The word *property* occurs in that branch of the sentence which contains an enumeration of *personal* property; clearly indicating that the testator thereby meant property ejusdem generis. In order to make the word property applicable to other than personalty, it will be necessary to read it as if it were contained in a third independent member of the sentence, and to interpolate "and" before "chattels." In *Chapman v. Prickett*, 4 M. & P. 404, 6 Bing. 602, the testator was possessed of freehold, leasehold, and copyhold property, and devised to trustees all his freehold messuages, and also all his stock or shares in the funds, and all money in hand and debts due to him, and all shares or *property* whereof he might be possessed or entitled to, upon trust for his wife and children: and it was held that the copyhold estate did not pass to the trustees. Tindal, C. J., in delivering the judgment of the

court, there says: "The testator appears to have known the distinction between freehold, copyhold, and leasehold property; for, his will begins with the express devise to his trustees of three freehold messuages, and then gives direction as to the rents and profits of the same messuages, and *all other freeholds or leaseholds* that he might be possessed of; and he lastly directs the division of his said three *freehold messuages*, either by sale or otherwise, amongst his children. Looking, therefore, at the will alone, we see no words which would comprehend the copyhold within the devise to the trustees; for, the word *property*, in the will, cannot be held to refer to real property, without doing violence to the context of the clause in which that word occurs." [*Bosanquet, J.*—The copyhold estate of the testator was in that case disposed of by a codicil.] That circumstance was not made the foundation of the judgment of the court. [*Tindal, C. J.*—How do you satisfy the words directing the payment of the annuity "arising from part of the ground rents payable to the testator *out of his manor of Brixton?*" By the leasehold at Brixton Causeway. [*Gaselee, J.*—It appears from the pleadings that the ground rents issued out of the freehold and copyholds.] The testator never possessed any property called the manor of Brixton.

Hoggins, for the defendants.—The language of the will is sufficient to pass the testator's copyhold estate. In *Doe d. Andrew v. Lainchbury*, 11 East, 200, a devise of all the residue of the testator's "money, stock, *property*, and *effects* of what kind or nature soever," to A. and B. "to be divided equally between them, share and share alike," was held to pass *real* as well as *personal* estate, the testator having in other parts of the will applied the words *property* and *effects* to real estate—beginning his will thus, "as to my money and *effects*, I dispose thereof as follows," &c., and then proceeding to dispose of parts of

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his *real* estate; and, again, having lands interlying with another's lands, directing the purchase of the latter, if offered for sale, *to be added to his other adjoining property*. So, in *Doe d. Wall v. Langlands*, 14 East, 370, where a testator, possessed of real and personal property, after several pecuniary legacies, "gave and bequeathed all and every the residue of his *property*, goods and chattels, to be divided equally between A. and B., share and share alike, after all his debts paid:" it was held that the word *property*, though thus followed by *goods and chattels*, was sufficient to carry the realty. And in *Doe d. Burkitt v. Chapman*, 1 H. Bl. 223, a devise of "all the rest and residue of my estate of what nature or kind soever," was held to include real as well as personal property, though accompanied with limitations peculiarly applicable and usually applied to personal property alone. "It was plainly the intention of the testatrix," says Wilson, J., "not to die intestate as to any part of her property, since it appears on the case that she had surrendered her copyholds to the use of her will." In *Patton v. Randall*, 1 Jac. & W. 189, a direction that all the testator's children should share equally in all his property, was held to give them the real estate in fee. Sir Thomas Plumer, M. R., says: "I think that, on the death of the testator, his real property vested in all his children. It is certainly not given to any other persons, and it is equally clear that he did not mean to die intestate. His children are to share all his property: this term must comprehend his real and personal estate; and I think, therefore, that the general residue, subject to the particular charge, is given to the children equally, in language that, by the recent cases, would certainly pass to them the fee, the whole legal and equitable estate." The rule laid down in some of the older cases came under review in the court of King's Bench in *Doe d. Morgan v. Morgan*, 6 B. & C. 512, 9 D. & R. 633, where a testator, after giving some pecuniary

legacies, proceeded thus—"all my property and effects of all claims I shall have, I give to my brother John; but my mother is at liberty to give 1000*l.* of my property where she pleases"—it was held that the real estate passed to the brother. Bayley, J., said: "Where a testator uses words calculated to pass the real estate, the real estate will pass by those words unless it be shewn clearly from other expressions in the will that the words were used in a more confined sense. The word *effects* *primâ facie* applies to personal property. But the word *estate* is sufficient to pass land. There may, however, be other parts of the will which shew that that word is confined to personal estate only. In one case, land was held to pass even under the words *personal estate*. In *Doe v. Langlands* it was held that the word *property* when used in a will would pass the real as well as the personal estate; and, if there are other expressions in the will calculated to raise a judicial doubt only whether the testator intended to confine the word *property* to his *personal* estate, I think those expressions ought not to control the effect of the word *property*, which has been held to include the real as well as personal estate. Here the testator gives to his brother 'all his property and effects of all claims he shall have,' thereby meaning that all his property and the produce of all his claims should go to his brother. It is much the same thing as if he had said, 'all I have, and all I am worth;' and it is quite clear that the real estate would have passed under those words."

Bayley, in reply.—In *Doe d. Morgan v. Morgan*, it was perfectly evident that the testator meant to dispose of all he possessed: the same remark applies equally to the other cases cited. Here, however, the testator having specifically devised and bequeathed his freehold and leasehold, it must be assumed that he intended to exclude his copyhold property from the operation of his will.

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TINDAL, C. J.—I think the words used in the will in question are sufficient to warrant us in saying that it was the testator's intention that his copyhold should pass. The object of the court must be to carry into effect, if possible, the intention of the testator; and such his intention is to be collected from the words of the devise, and also from the general scheme of the will and all the attendant circumstances—such as the nature and description of the property he had to dispose of, and the fact of the surrender of the copyhold to the use of the will. Looking at the terms of the devise, I think it is perfectly clear, upon the later authorities, that the word *property*, as therein used, is sufficiently comprehensive to convey both real and personal estate; and that, in order to limit and cut down its meaning to personalty only, we must see from other parts of the will that such was the clear and manifest intention of the testator. *Doe d. Andrew v. Lainchbury* is a strong authority to this point, and goes the full length of determining that real estate will pass under the general term *property*, notwithstanding that word be associated in the will with others more peculiarly descriptive of *personal* property, unless a clear indication of a contrary intention be to be collected from the rest of the will. Lord Ellenborough there says: "I know of no word in general use so inflexibly importing one meaning only as to be incapable of bending to the manifest sense of the party using it differently. In a late case (*Doe d. Tofield v. Tofield*, 11 East, 246), before us, we held that the words '*personal estate*' carried *real* estate, such being the clear meaning of the testator as collected from the rest of the will." The words used by the testator on the present occasion, are—"all my freehold and leasehold, and all my money, securities for money, stock in government funds, goods, chattels, and all other my property whatsoever and wheresoever." In the first place, it is to be observed that the testator uses the words "all my freehold and lease-

hold," without the word "estate." When, therefore, we find at the end of the sentence the words "and *all other my property* whatsoever and wheresoever," I think we do no injustice, nor any violence to the language of the devise, in holding it to include the testator's copyhold property: for, if "property" can have any application to real estate, it will undoubtedly carry copyhold also. It is said that we are not at liberty to divide the sentence into three branches, which (as it is contended) we must do in order to make the word property apply to other than the personal things which immediately precede it, for then it would be necessary to interpolate "and" between *goods* and *chattels*. There is force in the argument, though something hypercritical. My opinion is, that, if the testator had been asked what other property he had besides the copyhold, he would have been extremely puzzled to find any that was undisposed of by this will. After having made a general mass or aggregate of all his property, he directs that his wife shall "hold the same unto and for the use of his said wife, her *heirs, executors*, administrators, and assigns, for ever"—using words to denote that the property is to go to executors or heirs, as the case may be. Upon the whole, it seems to me that we shall adhere to the better authority of the later cases, if we say that the copyhold in question passed by this devise: and this opinion receives some confirmation from the circumstance that the testator had surrendered the copyhold to the use of his will. I am unwilling to rely on the clause that gives an annuity to Sarah Hendey; because there may be some doubt as to whether or not that annuity is charged upon the copyhold. If it was intended to issue in part out of the copyhold, then it is perfectly clear that the devise would comprehend the copyhold.

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GASELEE, J. (a).—I am of the same opinion. There

(a) Mr. Justice Park was at Nisi Prius.

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have undoubtedly been fluctuating decisions upon the point under consideration: but the later authorities have given a larger effect to the general intention of the testator. It seems to me to be impossible to distinguish this case from *Doe d. Andrew v. Lainchbury*, where the devise was of all the residue of the testator's money, stock, *property*, and *effects*, of what kind or nature soever; and it was held sufficient to pass real as well as personal estate. The word "effects" will suffice to carry real estate, provided it be the apparent intention of the testator that it should—*Hogan v. Jackson*, Cowp. 299; *Camfield v. Gilbert*, 3 East, 516. Our safest course I think will be to decide in accordance with *Doe d. Andrew v. Lainchbury*.

BOSANQUET, J.—I think it is impossible to entertain a doubt that it was the intention of this testator to dispose of all his estate of what kind soever. The word "property" will clearly pass real estate, unless it is manifest from other expressions in the will that the word was not intended to be used in that comprehensive sense. The argument drawn from the position of that word in this will, does not appear to me to be accurate. The testator enumerates the different kinds of property of which he professes to dispose—"all my freehold and leasehold, and all my money, securities for money, stock in government funds, goods, chattels," adding—"all other my property *whatsoever and wheresoever*." It seems to me to have been the plain intention of the testator to convey by his will all his property, of whatever description. It has been contended that the sentence is not legitimately susceptible of a three-fold division, and therefore, that, upon its true grammatical construction, the word *property* can only have relation to that part of the sentence in which things of a personal nature are described. I think, however, it would be too nice a criticism to say that the meaning of the word "property" must depend upon the presence or absence of the

copulative "and" before "chattels." The view the court is now taking is much strengthened by the terms of the habendum. For these reasons, I concur in thinking that the copyhold in question passed by the will.

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Judgment for the defendants (a).

(a) See Powell on Devises, 3rd ed., by Jarman, pp. 151 et seq., where all the cases on this subject are collected.

PLIMLEY and Another v. WESTLEY.

Friday,
Nov. 13th.

THIS was an action on a promissory note: the declaration also contained a count for goods sold and delivered. By consent of the parties, the following case was submitted for the opinion of the court:—

The defendant being indebted to the plaintiffs in the sum of 21*l.* 16*s.* for goods sold and delivered, indorsed and delivered to them, and they took, on or about the 10th February, 1834, on account of such debt, a promissory note for 21*l.* 16*s.* made by Robert Holden, payable two months after date to Messrs. Ryton & Walton, without the words "or order," but indorsed by Messrs. Ryton & Walton, and John Knight & Co.; from the latter of whom the defendant had received it for a valuable consideration. When the note became due, viz. on the 9th March, 1834, it remained in the hands of the plaintiffs; but it was not presented for payment until the 18th March, being nine days after it became due. It was dishonored, and was never paid. On the 25th March, 1834, the defendant received from the solicitor of the plaintiffs a letter requesting payment of the amount, on the ground that, the note not being negotiable for the want of the words "or order," the holders had no claim upon any of the parties to it except the defendant, from whom they received it. The

The defendant indorsed and delivered to the plaintiffs, in payment for goods, a promissory note made by one H. payable to R. & W. (without the words "or order"), and indorsed by R. & W. to K., and by K. to the defendant. The note being dishonored by the maker:—Held, that the plaintiffs were entitled to sue the defendant for the original consideration, notwithstanding no notice of the dishonor had been given—the instrument not being negotiable.

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defendant refused to pay the note, or the debt for which it was indorsed to the plaintiffs, upon the ground that he was discharged by their laches. Ryton & Walton and Knight & Co. respectively refused to pay the note, on the ground that they were discharged from liability by the neglect to present the note for payment, and their not having received due notice of the dishonor.

The question for the opinion of the court was, whether the defendant was liable to the plaintiffs upon the promissory note, or for the original debt for which it was indorsed to them; or was discharged from all liability. If the court should be of opinion that he was liable to the plaintiffs, either upon the note or for the original debt, then a judgment was to be entered for the plaintiffs by confession for 100*l.* immediately after the decision of the case, or otherwise, as the court might think fit: and if the court should be of opinion that the defendant was not liable either on the note or for the original debt for which it was indorsed to the plaintiffs, then judgment of *nolle prosequi* was to be entered for the defendant immediately after the decision of the case, or otherwise, as the court might think fit.

S. B. Harrison, for the plaintiffs.—Undoubtedly the plaintiffs in this case have been guilty of such laches in regard to the note as would in the case of an ordinary security have discharged the defendant. But, the note not being transferrable by reason of the absence of the words “or order” (Bayley on Bills, 5th edit. 120; *Hill v. Lewis*, 1 Salk. 132, S. C. nom. *Tassell and Lee v. Lewis*, 1 Lord Raym. 743), it was mere waste paper in the hands of the plaintiffs. They could not even sue the defendant as upon a new contract in respect of his indorsement (*Penny v. Innes*, 1 C. M. & R. 439), for, in that case, a new stamp would have been requisite. [The court called on—

Talfourd, Serjeant, for the defendant.—The contract on the part of the defendant with the plaintiffs, on the delivery of the note, was, to pay the amount on the default of the maker. It is true that no notice of dishonor need be given to one who can suffer no injury from the want of a notice. But here the defendant was by the laches of the plaintiffs deprived of his remedy on the note. Where a bill is drawn for the accommodation of an indorsee, and neither such indorsee nor the drawer has any effects in the hands of the acceptor, a subsequent indorsee, in order to entitle him to recover against the drawer, is bound to give notice of nonpayment—*Cory v. Scott*, 3 B. & A. 619; *Norton v. Pickering*, 8 B. & C. 610; 3 M. & R. 23.

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TINDAL, C. J.—It appears to me that the plaintiffs are entitled to judgment on the count for goods sold and delivered, being the original consideration for the note declared on. The only question is, whether or not the original debt was satisfied or extinguished by the delivery of the note. We must therefore see whether the plaintiffs had any means of enforcing payment of the note, or whether it was in their hands a mere piece of blank paper. It is perfectly clear, since the case of *Hill v. Lewis*, that the indorser of a bill of exchange is not discharged without actual payment, unless there has been some neglect or default in the indorsee: and the case of *Smith v. Kendall*, 6 T. R. 123, shews that promissory notes are placed upon the same footing in this respect. Here the promise was simply a promise to pay to Ryton & Walton, and to nobody else: the payee had no authority to indorse; consequently, neither the present plaintiffs nor the defendant, as indorsees, could have sued the maker upon it. I do not therefore perceive that the defendant has sustained any injury from the want of notice of the dishonor. *Hill v. Lewis* is an authority to shew that “every indorsement is

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a new bill, and so long as a bill is in agitation, and such indorsements are made, all the indorsers and every of them are liable as a new drawer." That was good law before the passing the stamp acts; but, inasmuch as this note on the face of it had all the force and effect of a valid promissory note, the stamp being once exhausted, the new contract evidenced by the indorsement was inoperative for want of a second stamp. I therefore think the plaintiffs were remitted to their right of action upon the original consideration.

The rest of the court concurring—

Judgment for the plaintiffs.

BALLS v. STAFFORD.

Saturday,
 Nov. 14th.

There cannot be a partial appropriation to a plea either of tender or of payment, of money paid into court in lieu of bail.

BAYLEY moved for leave to plead (amongst others) a plea of payment into court of the sum of 81*l.* 14*s.*, the plaintiff to be at liberty to appropriate to that plea the sum of 81*l.* 14*s.* out of a sum of 220*l.* already paid into court in this action. The affidavit upon which the motion was founded stated that the defendant was arrested under and by virtue of a writ of capias issued out of this court on the 28th August last, indorsed for bail for the sum of 200*l.*; and that the said sum of 200*l.*, together with 20*l.* for costs, was on or about the 23rd September last paid into court instead of putting in and perfecting bail, pursuant to the statute 7 & 8 Geo. 4, c. 71, s. 2; and that the said sum of 220*l.* remained in court in the cause.

THE COURT, referring to *Stultz v. Henegar*, 4 Moore & Scott, 472, where it was held that the court cannot allow part of a sum paid into court in lieu of special bail to be appropriated to the purposes of a plea of tender—the

third section of the 7 & 8 Geo.-4, c. 71, expressly pointing out the only mode in which money so deposited can during the progress of the cause be released, viz. by putting in and perfecting special bail—for the reasons there given, refused the rule.

Rule refused.

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ENGLER, Administrator of STULZ, v. TWYSDEN, Bart.

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THIS was an action brought by the plaintiff as administrator of one George Stulz, deceased, upon a bond in the penal sum of 606*l.* 7*s.* (conditioned for the payment of 303*l.* 3*s.* 6*d.*), given by the defendant to the intestate, and also to recover 7*l.* 10*s.* for goods sold and delivered by the intestate, in his life time. The defendant pleaded—first, that the cause of action did not accrue within twenty years—secondly, his discharge under the insolvent debtors act. It appeared at the trial that the defendant had obtained his discharge under the act in the year 1818. This fact was proved, and the certificate of his discharge from the Fleet prison produced, by the attorney by whom the proceedings had been conducted on his behalf upon that occasion. On the part of the plaintiff it was proved, that, finding amongst the papers of the deceased, a notice that the defendant intended to apply for the benefit of the insolvent debtors act, he had caused search to be made in the office, but could find no trace of his discharge—nothing more than that he appeared to have presented a petition and schedule, which by an indorsement on the back of it purported to have been dismissed, with leave to make a second application. The defendant produced the minute book of Mr. Clarkson, who at the period of his alleged discharge was the chief clerk of the insolvent court, which book

In an action by an administrator on a bond given by the defendant to the intestate more than twenty years ago, and on which no interest appeared to have been paid for many years, the defence was that the defendant had been discharged under the insolvent debtors act. The defendant having obtained a verdict, the court declined to relieve the plaintiff from costs under the statute 3 & 4 Will. 4, c. 42, s. 31, notwithstanding the defendant's schedule was not to be found in the office of the court—it appearing that, had the plaintiff made due search and inquiry, he would have discovered from the register book and the minute book of

the clerk of the court for the time being, that the defendant had obtained his discharge.

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contained an entry of his discharge on the 19th of November, 1818. A verdict was accordingly found for him.

Sir *W. Follett*, in Trinity Term last, on the part of the plaintiff, obtained a rule calling upon the defendant to shew cause why the verdict should not be entered up without costs, under the 3 & 4 Will. 4, c. 42, s. 31. The rule was drawn up on reading the record of *Nisi Prius* only. *Lysons v. Barrow*, 4 M. & Scott, 463, 10 Bing. 563, was cited and relied on.

Talfourd, Serjeant, shewed cause, upon the affidavits of the defendant and of his attorney, stating the fact of the former having been discharged under the insolvent debtors act on the 19th November, 1818, and that the intestate's name was inserted in the schedule, and notice duly given to him; and that the fact was communicated to the plaintiff as soon as the defendant was arrested: and also an affidavit made by one Waters, a clerk in the office of the court for the relief of insolvent debtors, which stated that there are two public books kept in the office, the one an index book containing the names of insolvents, opposite to whose names is a number referring to the page of the other public book, called a register book; that, in the index book, the defendant's name appeared three times with the several numbers 2144, 2168, and 2223, consecutively placed opposite to his name; that such entry shews that three petitions and schedules were filed by the defendant, the numbers referring to the pages of the register book; that the register book contains also an entry of the names of insolvents, the numbers of their schedules, the prison where they are in custody, when order made, the day of the hearing upon their petitions, whether notices served upon creditors or whether insolvents advertized, whether discharged or remanded, and what was done upon the hearing; that this book has eight

columns, in the form following, and which, as far as related to the defendant, were filled up as under:—

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Page 2144.	Name and prison.	Day petition and schedule presented.	Order made.	Advertised or served.	Day of hearing.	Discharged or remanded.	Re-hearing.
17783.	Fleet. William Twyden.			S.	August 25th.		Petition dismissed.

Page 2145.	Name and prison.	Day petition and schedule presented.	Order made.	Advertised or served.	Day of hearing.	Discharged or remanded.	Re-hearing.
18108.	Fleet. William Twyden.			A.	1818, Oct. 14.		Order for hearing dismissed.

Page 2283.	Name and prison.	Day petition and schedule presented.	Order made.	Advertised or served.	Day of hearing.	Discharged or remanded.	Re-hearing.
18838.	Fleet. William Twyden.		1818, Nov. 19th.	A.		D.	Lost schedule.

That the several words "petition dismissed," "order for hearing discharged," and "lost schedule," and the letter "D.," are marked in pencil; that the letter D. so marked in pencil shews that the defendant was discharged; that the letters D. opposite to the names of other persons so discharged are all marked in pencil; that the defendant had been informed and verily believed it to be true that it was the usual custom at the time of the defendant's discharge so to mark the letter D. in pencil, for the sake of expedition: that each schedule has an indorsement thereon shewing what was done upon the hearing of each insolvent's petition; and, in ordinary cases, the custom of the office is, when the party making search has found the name of the insolvent in the index book, for the clerk to refer to the register book which gives the numbers of the schedules, and to hand to the party the schedule itself for inspection, but that, when inquiry is made after one of

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the lost schedules, and the party is desirous of ascertaining what was done thereon, not only the register book, but also a certain minute book of Mr. Clarkson, who was in the year 1818 the chief clerk of the court, is referred to, if necessary, for the purpose of affording correct information upon the subject; that the clerks in the office are at all times ready and willing to give every assistance and explanation about the discharge of insolvents, in order that the party applying for such information may arrive at the particulars in any way relating to such discharge; and that it was very evident from the entries in the books that the defendant (although his schedule had been lost) was discharged under the act upon the said schedule in the year 1818; and that such information would have been given to any party requiring it as would have satisfied him of the fact.

The learned Serjeant submitted, that the only effect of the statute 3 & 4 Will. 4, c. 42, s. 31, was, to place executors and administrators plaintiffs upon the same footing with respect to costs as any other plaintiffs, reserving to the court a right, in the exercise of their discretion upon the particular circumstances of the case, to relieve them from costs where they appeared to have acted *bonâ fide*, and to have been induced to proceed by some misrepresentation or undue concealment on the part of the defendant. In *Wilkinson v. Edwards*, Ante, Vol. 1, 173, 1 New Cases, 301, it was held, that, where an executor has commenced an action without using due diligence to ascertain that he can proceed with a reasonable prospect of success, or is guilty of any laches so as to cause unnecessary expense or vexation to the defendant, the court will not interpose to excuse him from costs. In *Southgate v. Crowley*, Ante, Vol. 1, 374, 1 New Cases, 518, the court go a little further, and hold that the discretion given to the court or a judge by this statute is not to be governed by the fact of the action having been properly brought; but it must

be shewn that the plaintiff has been induced to bring it by something like fraud or misrepresentation on the part of the defendant: the mere fact that the defendant when applied to refuses to state the ground of his resistance of the claim, will not suffice. Tindal, C. J., there says: "The question is, whether there has been anything in the conduct of the defendants that will justify us in depriving them of the benefit the legislature have intended to give them." And the court of Exchequer, in *Godson v. Freeman*, 2 C. M. & R. 585, 1 Tyr. & Gr. 35, coincided in these decisions of this court. The facts proved upon the trial of this case, as well as those disclosed by the affidavits made in answer to this rule, clearly shew that the plaintiff had not the shadow of a pretence for instituting the present suit; and that the smallest inquiry and exertion would have put him in possession of the fact of the defendant being no longer liable for the debt.

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Sir *W. Follett*, in support of his rule.—From what appeared at the trial, and from what now appears upon the affidavits produced on the part of the defendant, it is perfectly clear that the plaintiff had no means of ascertaining whether or not the defendant had been discharged under the insolvent debtors act; still less whether the name of the intestate appeared in his schedule. The bond being unpaid, it was therefore clearly his duty to bring the action. Formerly, the general rule exempted executors or administrators from payment of costs when they were nonsuited or had a verdict against them, where the action was brought upon a contract entered into by the testator or intestate, or for a wrong done in his lifetime. The late statute, however, has somewhat altered the law in this respect. But it was never intended that executors or administrators should in all cases be visited with costs: a discretion is given to the court to grant or to withhold costs from the defendant, so as to meet the justice of each par-

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ticular case. The words of the act are, "that, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, *unless the court in which such action is brought, or a judge of any of the superior courts, shall otherwise order*, be liable to pay costs to the defendant, in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself." Undoubtedly, if an executor chooses to bring an action without making due inquiry as to the probability of a successful result, he is not to be relieved. In *Godson v. Freeman*, the debt had been paid; and in *Southgate v. Crowley*, the plaintiffs, had they instituted a diligent and careful investigation of the facts before they brought the action, must have discovered that the defendants were not indebted to the estate of the deceased in a larger sum than that tendered. The judgment of this court in *Lysons v. Barrow* puts the matter upon the most rational footing, and is entitled to great weight. Park, J., in delivering the opinion of the court, there says: "One main point to consider is, was this a frivolous action? So far from it, that it appears from the affidavit that it was the bounden duty of the plaintiffs to the estate of the testator to bring an action. The defendant claimed no interest in the matter, and frequently declared he should not defend the cause. The plaintiffs were defeated upon a ground which they could not be supposed to apprehend. The promise could only, from the nature of the case, be a promise *after* the death of the testator; but still, if a verdict had been obtained by the plaintiffs, the fruit of the verdict would have been the testator's assets. The action could only be brought by the plaintiffs in their representative character; for, in their individual state, they had no more right to sustain an action than the greatest stranger. Therefore, though the statute 3 & 4 Will. 4, c. 42, s. 31,

gives costs against executors who fail in their actions; yet, if it shall appear to the court proper to make exceptions to the generality of the enactment, they may do so where there is a reasonable or probable cause for bringing the action as executors or administrators; otherwise we should not find in the clause the important words 'unless the court in which such action is brought, or a judge of any of the superior courts, shall otherwise order.' The result of that case is, that if, in the exercise of his duty, an executor or administrator fairly and bonâ fide proceeds with his action after having, as far as he reasonably can do so, satisfied himself of the propriety of the demand he is seeking to enforce, he will not, in the event of a failure by reason of some circumstance that is beside the justice of the case, be visited with costs. In the present case, the fact of the defendant being discharged under the insolvent debtors act, so far from being one that the plaintiff might have acquainted himself with by using ordinary exertion, is even now left in very considerable doubt and obscurity.

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TINDAL, C. J.—I see nothing in the circumstances of this case that calls upon the court to exercise its discretion in favour of the plaintiff. The statute 3 & 4 Will. 4, c. 42, s. 31, puts executors and administrators (plaintiffs) upon the same footing in respect to costs as any other plaintiffs, with this single exception, viz. that the former may, upon a proper state of facts, apply to the court or a judge for relief. In this there is no hardship upon the executor; for, if he, having used a sound and bonâ fide discretion, fails in the suit, the costs will be payable out of the estate of his testator. The question then is, whether enough has been shewn to us in this case to induce us to hold that this plaintiff stands in such a position as takes his case out of the ordinary rule. I cannot help thinking that the rule laid down in *Lysons v. Barrow* is rather more

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favourable to executors than the statute will in strictness warrant (a). I think the sounder rule is, to hold the defendant to be in all cases entitled to his costs, unless it shall appear that he has brought the action upon himself by practising something like a fraud upon the plaintiff (b). In the present case there is no pretence for saying that the defendant has in any way misled the plaintiff; but, on the contrary, it appears that the plaintiff, having in his own hands a document calculated to excite his vigilance, altogether failed to exercise that degree of care and caution which his situation demanded of him. In the first place, it is to be observed, that the very fact of the bond having been suffered by the intestate to lie so long unpaid was of itself sufficient to arouse the suspicion of a prudent man, no interest appearing to have been paid in the meantime: it was but reasonable to suppose that there existed some difficulty in its being put in suit. Then, there was the notice of the defendant's intention to petition the insolvent debtors court for his discharge, which was found amongst the papers of the deceased. If the plaintiff had caused proper and diligent search to be made in the office of the insolvent debtors court, he would have learned that the schedule produced, with the indorsement intimating that the petition had been dismissed, with liberty to the defendant to make a second application, did not evidence the ultimate decision of the court, and a very little further search would have brought under his notice the minute book of the clerk, with a D. opposite the defendant's name, which appears to have been intended to denote that the party had been discharged. A careful and prudent man would, under such circumstances, have paused to make more searching inquiry, before he pro-

(a) See *Spence v. Albert*, 2 A. Tyr. 322.

& E. 785, 4 N. & M. 385; *Ashton v. Poynter*, 1 C. M. & R. 738, 5 (b) As was held in *Southgate v. Crowley*, Ante, Vol. 1, 374.

ceeded to incur the expense of an action with so slender a prospect of success.

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ENGLEB

v.

TWYDEN.

PARK, J.—The statute gives the court a discretion as to whether or not they will, upon a careful examination into the facts of each particular case, exempt from costs executors or administrators suing in right of their testator or intestate. The question for us to decide is, whether the circumstances brought to our notice on this occasion are such as ought to entitle the plaintiff to this exemption. The facts to which the Lord Chief Justice has called our attention appear to me to shew very strongly that the plaintiff has been wanting in diligence: no prudent or sensible person would, without more inquiry, have commenced an action on a bond that had lain by so long. The strong presumption is, that the plaintiff relied upon the defendant's inability to establish the fact of his discharge under the insolvent debtors act, in consequence of the schedule being lost. It does not become me to say whether or not some of the expressions contained in the judgment in *Lysons v. Barrow* are too strong: the judges who concurred in that decision thought that the circumstances of the case warranted them in exercising their discretion in favour of the plaintiffs. *Southgate v. Crowley*, however, stands unimpeached, and affords a very strong authority in favor of the present defendant. The plaintiff ought not under all the circumstances to have arrested the defendant.

GASELEE, J., concurring—

Rule discharged, without costs (c).

(c) BOSANQUET, J., was sitting in the court of Chancery.

1835.

Monday,
Nov. 16th.

CORRY v. WHARTON.

SAME v. SAME.

Where a rule is obtained in two causes, the affidavits must be intitled in both of them, though the plaintiff and defendant be the same in both.

A RULE having been obtained in these two causes, upon affidavits intitled in one of them only—

Arnold objected to their being read.

PER CURIAM.—The affidavits must be re-sworn. They are not affidavits made upon the subject matter on which we are to adjudicate: consequently perjury could not be assigned on them.

The affidavits were accordingly re-sworn.

Tuesday,
Nov. 17th.

In re BARBER and WARD's Trustees.

A British consul has power by the 6 Geo. 4, c. 87, s. 20, to certify as to the handwriting and authority of the party before whom is sworn the affidavit verifying the certificate of the taking of an acknowledgment of a married woman (abroad) under the 3 & 4 Will. 4, c. 74.

BY the 3 & 4 Will. 4, c. 74, s. 85, it is enacted that every certificate pursuant to s. 84, of the taking of an acknowledgment by a married woman of any deed executed pursuant to the act, together *with an affidavit by some person verifying the same*, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the court of Common Pleas at Westminster, to be appointed as thereafter (by s. 89.) mentioned; and such officer shall examine the certificate, and see that it is duly signed either by some judge or master in Chancery, or by two commissioners appointed pursuant to the act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and, if all the requisites in the act in regard to the certificate shall have been complied with, then such officer shall cause

the said certificate and the affidavit to be filed of record in the said court of Common Pleas.

1835.

Ex parte
BARBER.

Talfourd, Serjeant, moved that the clerk of the inrolments appointed under the above statute might be directed to file of record a certificate of acknowledgment taken in this matter: it had been objected to on the ground that the affidavit verifying it (taken abroad) was certified by the British consul instead of by a notary public. [*Tindal*, C. J., referred to *Ex parte Hutchinson*, 1 M. & P. 559, 4 Bing. 606, where it was held that a British consul at a foreign port has no authority, under the 6 Geo. 4, c. 87, s. 20, to administer an oath of the acknowledgment of a party levying a fine.] That case is merely an authority to shew that a British consul has no authority to take the affidavit itself; not that he has not authority to certify as to the handwriting and authority of the party before whom it is sworn. Before the 6 Geo. 4, c. 87, a notary public would have been the proper person to certify: but by that act British consuls are in this respect put upon the same footing as public notaries; for by section 20—after reciting that it is expedient that every consul-general or consul appointed by his majesty at any foreign port or place, should in all cases have the power of administering an oath or affirmation whenever the same should be required, and should also have power to do such notarial acts as any notary public may do—it is enacted “that it shall and may be lawful for any and every consul general or consul appointed by his majesty at any foreign port or place, whenever he shall be thereto required, and whenever he shall see necessary, to administer at such foreign port or place any oath, or take any affidavit or affirmation from any person or persons whomsoever, and also to do and perform at such foreign port or place all and every notarial acts and act which any notary public could or might be required and is by law impowered to do within the united kingdom of Great Britain and Ireland.”

1836.

Ex parte
BARNER.

PER CURIAM.—Upon the fair construction of the statute, we think this is an act that a British consul is impowered to do. It seems to have been the intention of the act to place consuls upon the same footing in all respects as notaries public.

Fiat.

Wednesday,
Nov. 18th.

FOSTER and Another v. LEY.

The testatrix, after giving several legacies, the duty upon which she directed her executors to pay, devised and bequeathed the residue of her estate both real and personal to certain trustees, in trust, in the first place "to pay off and discharge all debt and debts" of her first husband that could be satisfactorily proved against him, as it was her "will and desire that the same should be discharged."

After the death of the testatrix a bill was filed in Chancery in order to ascertain the debts payable under this devise. In the result, the defendant's claim, amongst others,

was allowed, and paid by the executors. The plaintiffs (the executors) were afterwards called upon to pay to the Stamp office the legacy duty upon the sum so paid to the defendant:—Held, that they were entitled to recover the amount of such duty in an action for money paid to the defendant's use—notwithstanding the statute 30 Geo. 3, c. 52, s. 25.

THE following case was submitted for the opinion of the court:—

This was an action on promises brought to recover from the defendant the sum of 67*l.* 4*s.* 4*d.*, alleged to have been paid by the plaintiffs for the use of the defendant. The defendant pleaded non-assumpsit, and upon that plea issue was joined. The plaintiffs were executors appointed by the will of Jemima Webber, deceased. The testatrix was twice married: her first husband, J. W. Glubb, died insolvent in November, 1804. She survived also her second husband, W. A. Webber; and, after his death, being the owner of real and personal property, by her will, bearing date the 23rd March, 1829, duly executed and attested to pass real estates, after devising certain real estates to trustees upon certain trusts therein declared, bequeathed, first, six legacies, the legacy duty on which she ordered to be paid by her executors; then 5*l.* to each of her servants, with no mention of the legacy duty; then, 400*l.* stock to trustees for certain purposes, the legacy duty to be paid by her executors; then, her clothes and jewels to a niece, and a watch to her nephew, S. S. Richards. The will then concluded as follows:—"All the rest, resi-

due, and remainder of the monies which I have in house or in government or other securities at the time of my decease, and all other my real, personal, and testamentary estate, substance, and effects whatsoever and wheresoever, after the payment of my just debts and funeral expenses, which I desire may be settled as soon as may be after my decease, and the several legacies hereinbefore by me given and bequeathed and directed and appointed, and the expenses of proving this my will, and wherewith I expressly charge the same, I give, devise, bequeath, direct, and appoint unto A. Foster and W.P. Thomas, their heirs, executors, administrators, and assigns, upon trust, in the first place, to pay off all and every debt and debts of my first husband J.W. Glubb that can be legally and satisfactorily proved against him, as it is my will and desire that the same shall be discharged; and all the monies remaining unexpended, upon trust for my nephew S.S. Richards, his executors, administrators, and assigns."

The testatrix died on the 26th March, 1830, without having revoked or altered her said will. She was not in any respect liable for the debts of her first husband; and, at the time of her death, there was a debt of 67*2l. 3s. 4d.*, capable of legal and satisfactory proof, remaining unpaid from her said first husband to the defendant, who was a stranger in blood to the testatrix. Shortly after her death, S. S. Richards, the residuary legatee named in the will, filed a bill in Chancery against the plaintiffs as executors, in order to ascertain what were "the debts of the said J. W. Glubb that could be legally and satisfactorily proved against him," and to relieve the plaintiffs from responsibility in respect thereof. The cause was heard in July, 1831, when it was ordered, amongst other things, that it should be referred to the master to inquire and state to the court whether any and what debts of the said J. W. Glubb could be legally and satisfactorily proved against him. The master was attended by the defendant and

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other claimants, and subsequently made his report, dated the 26th August, 1833, which was absolutely confirmed by an order of the court of Chancery, dated the 2nd December, 1833; whereby he certified that the above-mentioned debt (amongst others) was legally and satisfactorily proved. The cause came on for further directions on the 21st December, 1833, when the court ordered that the said A. Foster and W. P. Thomas, the executors of the testatrix's will, should, out of the personal estate of the testatrix, pay the debts reported due to the several creditors named in the schedule to the master's report, including the above-mentioned debt of 67*l.* 3*s.* 4*d.* due to the defendant: And it was ordered that the executors should pay over the residue of the personal estate to the said S. S. Richards, after deducting the costs, charges, and expenses incurred by them; and any of the parties were to be at liberty to apply to the court as there should be occasion. The plaintiffs in this action accordingly paid to the defendant the said sum of 67*l.* 3*s.* 4*d.* Upon the plaintiffs subsequently settling their accounts as executors with the Stamp-office, a claim was made on its behalf upon the plaintiffs for 67*l.* 4*s.* 4*d.*, the legacy duty upon the above sum of money paid to the defendant, which claim the defendant, on request made to him by the plaintiffs, refused to discharge: in consequence of which the plaintiffs afterwards, on the 7th February, 1835, paid to the Stamp-office the sum of 67*l.* 4*s.* 4*d.*, the legacy duty chargeable on legacies to strangers in blood to the deceased, and brought the present action against the defendant.

Question.

The question for the opinion of the court was—whether the plaintiffs were entitled to recover from the defendant the said sum of 67*l.* 4*s.* 4*d.* If the court should be of opinion that the plaintiffs were entitled to recover, then a verdict was to be entered for the plaintiffs; but, if of a contrary opinion, then a verdict was to be entered for the defendant.

Sir *W. Follett*, for the plaintiffs, was stopped by the court.

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LEV.

First point.

Crowder, for the defendant.—1. This action is not maintainable, by reason of the order of the court of Chancery referred to in the case. The 25th section of the 36 Geo. 3, c. 52, provides, “that, if any suit shall be instituted concerning the administration of the personal estate of any person dying testate or intestate, or any part of such estate, in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the court wherein such suit shall be instituted shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed; and, in taking any account of any personal estate, or otherwise acting concerning the same, such court shall take care that no allowance shall be made in respect of any legacy, or part of legacy, or of any residue, or part of residue, in any manner whatsoever, without due proof of the payment of the duties hereby imposed.” The order of the court is final; or, at all events, the matter is so drawn into the court of Chancery that that court alone has jurisdiction.

2. Supposing that this court can entertain the subject, the next question is, whether the duty is payable by the defendant or by the plaintiffs, that is, out of the residue; if payable out of the residue, this action is not maintainable. Looking at the situation of the testatrix, and the object she had in view, viz. the restoration of the tarnished reputation of her deceased husband (who in fact was the object of her bounty), it is perfectly clear, that, unless the court hold that the creditors are to be paid their respective demands free of the legacy duty, the object of the testatrix will be in part frustrated. The authorities shew, that, wherever it may fairly be inferred to be the intention of the testator that the duty should not be paid

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by the legatee, the courts are anxious to carry that intention into effect. In *Barksdale v. Gilliat*, 1 Swanst. 562, the legacies were directed to be paid *without deduction*; in *Smith v. Anderson*, 4 Russ. 352, *without any deduction whatsoever*; in *Dawkins v. Tatham*, 4 Sim. 492, *clear of all deductions*; in *Courtoy v. Vincent*, 1 Turn. & Russ. 433, *clear of the property tax and all expenses attending the same*; in *Gosden v. Dotterill*, *free from all expense*; in *Louch v. Peters*, 1 Mylne & K. 489, *clear of all taxes and outgoings*; and in *Stow v. Davenport*, 5 B. & Ad. 359, 2 N. & M. 805, *clear of all taxes and deductions whatsoever*; and in all these cases it was held that the legatees and annuitants were entitled to receive the full amount of their respective legacies and annuities, without any deduction in respect of legacy duty. In the present case, it is impossible to collect from any part of the will an intention on the part of the testatrix that any portion of the debts of her deceased husband should remain unpaid. The testatrix, it is clear, did not contemplate that one creditor should receive more than another; and yet this might be the case if some one or more of them should be in any degree related to her. Generally speaking, legatees are mere volunteers: but, in the case of creditors, it is different. A trust is imposed upon plaintiffs by this will, which they can only discharge by payment of the debts in full.

First point.

TINDAL, C. J.—I am of opinion that the plaintiffs in this case are entitled to judgment. Two grounds of objection have been urged on the part of the defendants. The first is, that, under the circumstances, and without any reference to the nature of the legacy itself, the action is not maintainable, because the court of Chancery, before which the question has been, was bound to adjudicate and decide between the parties as to the payment of the duties imposed by the statute 36 Geo. 3, c. 52; the 25th section

of which is referred to in support of this position. I should rather think, however, that the case falls more strictly within the 24th section, by which it is enacted, "that, in case any suit shall be instituted for payment of any legacy or residue, or part of residue, of any personal estate, and the person or persons sued for the same shall be desirous of staying proceedings in such suit on payment of the money due, or delivering or otherwise disposing of the specific effects demanded, after deducting or receiving the duty payable thereon, it shall be lawful for the court in which such suit shall be instituted, if it shall see fit, on application in a summary way, to make such order for payment of such legacy or residue, or part of residue, or for delivering or otherwise disposing of such effects, and for payment of the duty payable thereon, and all such costs, charges, and expenses attending such suit, as shall be just." This seems to be a suit where there is no contested right, rather than an adverse suit within the contemplation of the 25th section. But, supposing the case does fall within the last mentioned clause, I can only understand it to mean, that, for the protection of the revenue, the court in which the suit is instituted shall make an order for the payment of the duty. The attention of the court was not called to the point. It does not follow, that, because the statute declares that it shall be lawful for the court of equity to make an order for the payment of the duty, the subject matter is not open to investigation in another forum. It appears to me, that, as the statute makes the duty a debt payable in the first instance by the executors, having paid it, they are entitled to recover it back either from the defendant or from the residuary legatee. This brings us to the next question, which is, whether the legacy duty so paid becomes a debt demandable from the specific legatee or from the residuary legatee. On the part of the defendant, it is contended that the legacy ought to be paid free and clear of duty. There is, how-

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ever, nothing on the face of this will to warrant the inference that the testatrix intended that her estate should in this particular instance be charged with the payment of the duty. Where she has intended it, such intention is intelligibly expressed. It is said that the intention of the testatrix cannot be carried into effect without holding the legacy duty to be payable out of the residue; for that the debts of her first husband could not be said to be paid off and discharged unless the full amount were paid to the respective creditors. But in point of fact the entire debt has been paid: the payment of the duty is a burden imposed upon the legatee after he has received the legacy. He may in some sense be said to be a volunteer. He was not bound to accept the legacy: but, having elected to take it, he must take it cum onere. It seems to me that we should be doing violence to the will if we were to throw upon the residuary legatee a duty which the law has cast upon the defendant. I therefore think the action is properly brought.

GASELEE, J.—I am also of opinion that the legacy duty was payable in this case by the legatee. It is very probable that the testatrix was ignorant of the effect of her bequest; and it is evident that she was equally ignorant of the names of the persons in whose favor it was to operate. But, had all the creditors been specifically named, they would nevertheless have been chargeable with the duty.

BOSANQUET, J.—I am of the same opinion. I think the proceedings in equity do not estop the plaintiffs from maintaining this action. The sole object of those proceedings was, to ascertain what debts were payable. It is true that the 25th section of the statute 36 Geo. 3, c. 52, requires the court, in case any suit shall be instituted in which direction is given touching the payment of legacies, to provide for the payment of the duties: but here no

question was raised as to who was to pay the legacy duty ; indeed, no party seems to have contemplated that any duty was payable at all. The will directs the trustees and executors, " in the first place to pay off all and every debt and debts of the testatrix's first husband, J. W. Glubb, that could be legally and satisfactorily proved against him, as it was her will and desire that the same should be discharged." When the sum due from Glubb to this defendant was ascertained, it became a legacy payable to him ; and the question is, whether the duty payable in respect of the legacy is to be paid by the defendant or by the residuary legatee. Looking at the terms of the will, I am unable to collect thence that the testatrix intended the debts to be paid free and clear of duty. Where such was her intention, she has taken care to express it. It is said that, unless the duty be paid out of the residue, the intention of the testatrix will in part be frustrated, inasmuch as the debts of her late husband will not be wholly discharged. In contemplation of law the whole is paid to the legatee : and the law casts on him the burthen of the duty. In order the better to secure its due payment, the statute makes the executors responsible for it.

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Judgment for the plaintiffs.

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*Thursday,
Nov. 19th.*

WILKES v. THE HUNGERFORD MARKET COMPANY.

The defendants, under the authority of an act of parliament, which enabled them to close certain ancient ways therein mentioned, provided they opened another and a different way therein also described, stopped up and obstructed the ways, and kept and continued them so stopped up (no new one being opened) for a period which the jury found to have been unreasonable and unnecessary. The plaintiff carried on the business of a bookseller in a court which formed a continuation of the line of thoroughfare so obstructed by the defendants, and his customers were proved to have consisted almost entirely of persons who had been in the habit of using the thoroughfare; and it was also proved, that, in consequence of the way being so obstructed, his business had materially declined:—Held, that the injury thus sustained by the plaintiff was such as to entitle him to maintain an action on the case, notwithstanding there might be many other individuals on the same line of thoroughfare similarly damaged by the act of which he complained.

CASE for continuing for an unreasonable and unnecessary length of time an obstruction in a public footway or passage, whereby the plaintiff sustained damage, in the loss of custom of persons who had been in the habit of frequenting the way.

The declaration stated, that, before and at the time of the committing of the grievance by the defendants, as thereafter mentioned, there was and still of right ought to be a certain public footway, passage, or thoroughfare, leading from and out of the Adelphi, in the county of Middlesex, into, through, over, and along divers streets, courts, and passages, into a court called Craven Court, and so from thence into, through, over, and along a certain other court called Northumberland Passage; and from thence into, through, over, and along divers other streets, courts, and passages, unto and into a certain place called Whitehall, all in the county aforesaid, and so from thence back again through, over, and along the said streets, courts, and passages aforesaid, unto the Adelphi aforesaid; and also a certain other public footway, passage, or thoroughfare leading from and out of a certain street called the Strand, in the county of Middlesex, and through, over, and along divers streets, courts, and passages, into the aforesaid court called Craven Court, and so from thence into, through, over, and along the aforesaid court called

By the act it was provided that no action should be brought against any person for any thing done in pursuance of the act or the powers thereby given, until notice &c., or after tender of amends, or after six months after the cause of action should have arisen. The jury found the unjustifiable obstruction to have been continued from the 2nd of April down to the 2nd of July, 1833; the action was commenced on the 30th of December in the same year:—Held, that the plaintiff was only entitled to recover damages in respect of the two days that were within the period limited by the act.

Northumberland Passage, and from thence into, through, over, and along divers other streets, courts, and passages, unto and into the said place called Whitehall, all in the county aforesaid, and so from thence back again, through, over, and along the said last-mentioned streets, courts, and passages, into the street called the Strand aforesaid, for all persons to go, return, pass, and repass, on foot, every year and at all times of the year, at their free will and pleasure; that the plaintiff, before and at the time of the committing the grievance thereafter mentioned, was possessed of a certain messuage and premises, with the appurtenances, situate and being partly in a certain street called Craven Street, and partly in the said court called Northumberland Passage, and next to and adjoining the said public thoroughfares, in which said messuage and premises the plaintiff, before and at the time of the committing of the grievance thereafter mentioned, carried on the trade and business of a bookseller, and was used and accustomed to make and did make divers great gains and profits by the sale of divers large quantities of books and pamphlets to divers persons passing and repassing by his said messuage and premises, by, through, and along the said thoroughfares: yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in his trade and business of a bookseller, and to prevent his customers from passing and repassing by and along the said thoroughfares, theretofore, to wit, on the 1st April, 1832, and from thence for a long space of time, to wit, for the space of eighteen calendar months next following, wrongfully and injuriously kept and continued the said thoroughfares leading from the Adelphi aforesaid to Craven Court aforesaid, and from the Strand to Craven Court aforesaid, and also one of the said courts in the said thoroughfares, to wit, the court in the said thoroughfares called Craven Court aforesaid, shut and closed up; the same being an unreasonable and un-

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necessary length of time; and thereby during all the time aforesaid obstructed the said thoroughfares, and hindered and prevented the said plaintiff from carrying on his said trade and business in so large, ample, and beneficial a manner as he otherwise might and would have done: and thereby the plaintiff had during all the time aforesaid lost and been deprived of divers great gains and profits which might and otherwise would have arisen and accrued to him from carrying on the said trade and business of a bookseller in his said messuage and premises.

The defendants pleaded—first, not guilty—secondly, that they did not keep and continue the thoroughfares in the declaration mentioned, leading from the Adelphi to Craven Court aforesaid, and from the Strand to Craven Court aforesaid, and the said court in the declaration mentioned called Craven Court, or any or either of them, shut and closed up, nor did they obstruct the thoroughfares, or any or either of them, and thereby or by any of the means aforesaid hinder or prevent the plaintiff from carrying on his said trade and business, in manner and form as in the declaration mentioned: whereupon issue was joined.

11 Geo. 4, c.
 lxx, s. 64.

Section 64—
 Authority to
 stop up ways.

The defendants rested their defence upon the act of parliament by which the Hungerford Market Company was incorporated. By s. 63, the company are authorized, "so soon as they should have completed the purchase of the market, market-house, messuages, shops, wharfs, and hereditaments already contracted for as therein mentioned, to take down or alter the same, and to erect a new market, and also to take down Hungerford Street, and erect other houses in lieu thereof." By s. 64, it is enacted, "that, in erecting the several buildings thereinbefore authorized to be erected, it shall be lawful for the company to build on so much of the places called One Tun Court, Heel Alley, and Charles Court, as are bounded by and included between any of the messuages and buildings therein autho-

rized to be pulled down, and thereby to stop up the way or passage over the same parts of the said courts and alley : provided always that the said company do make an avenue from the said market to and in a straight line with Duke Street in the Adelphi, of the width of twelve feet, and underneath some of the buildings to be erected pursuant to the act ; and also do make passages to the York Buildings Wharf from the said market, and also from Villiers Street in the Strand." And by s. 93, it is enacted that "no action shall be brought against any person for anything done in pursuance of the act or the powers thereby given, until twenty-eight days' notice shall have been given in writing to the defendants, signed by the attorney for the plaintiff, specifying the cause of action ; or after tender of amends ; *or after six months after the cause of action shall have arisen* : and the defendants in every such action may plead the general issue, and give the act and the special matter in evidence, and that the same was done in pursuance of the act."

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Section 93—
 Limitation of
 actions.

The cause was tried before the Lord Chief Justice at the Sittings at Westminster after last Hilary Term. The facts were as follow :—The plaintiff was a bookseller carrying on business at a shop at the corner of Northumberland Passage in Craven Street. His customers consisted almost entirely of persons in the habit of passing through the Adelphi, Heel Alley, Craven Court, and Northumberland Passage, on their way to Whitehall and Westminster. In the execution of the works authorized by the act of parliament referred to, the defendants necessarily stopped up Craven Court at the west side of the market, and Heel Alley and Hungerford Street on the east. The obstruction complained of was, that, after the completion of the works in the execution of which the antient ways were so necessarily stopped up, the defendants unnecessarily continued boards standing for an unreasonable period. The western impediment was removed before the 21st of

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February, 1833; the eastern, on the 2nd July in the same year. The action was commenced on the 30th December. Craven Court was stopped up for fifteen months; Heel Alley was removed altogether, and a new arcade opened in lieu of it after the lapse of about eighteen months.

On the part of the defendants, it was submitted that they were justified by the act in stopping up One Tun Court, Heel Alley, and Charles Court; and it was contended, that the declaration should have charged the defendants, not for closing the old passages, but for neglecting to open new ones; that the only remedy, if the company had acted illegally, was, by indictment, and not by action; and that the action was not commenced in time. The jury found that the obstruction had been continued for three months longer than was reasonable or necessary, and accordingly returned a verdict for the plaintiff, assessing the damages at 10*l.* per month.

F. Kelly, in pursuance of leave, obtained a rule nisi to enter a nonsuit, or to reduce the damages to 13*s.* 4*d.* The former part of the motion rested upon two grounds—first, that a material allegation in the declaration, as to the existence of the right of way, was disproved—secondly, that the act complained of was a public nuisance, common to all the public, and therefore the subject of an indictment, and not of a civil action. 1. The way the stoppage of which is complained of is, “from the Adelphi to Craven Court, and from the Strand to Craven Court, and also the court called Craven Court;” and the defendants are charged with having kept these ways closed up for an unreasonable and unnecessary length of time. But it appeared from the evidence that the right of way in question had, before the cause of action (if any) accrued, by force of the act of parliament, altogether ceased and been extinguished. It never was the duty of the defendants to re-open that way; but to open in lieu of it the way now in use. The com-

First point—
 As to the form
 of the declara-
 tion.

plaint therefore is misconceived: the plaintiff should have declared for not opening the new and substituted way within a reasonable time. 2. Where the injury is not peculiar to an individual, but is common to a large proportion of the public, the only remedy is by indictment. The authorities upon the subject are not reconcileable; but each case must depend upon its own particular circumstances. In *Hubert v. Groves*, 1 Esp. 148, the declaration stated that the plaintiff, being possessed of a certain messuage &c., had enjoyed and was entitled to a certain way from and out of the said messuage &c., through, along, and over a certain street called Dean Street, for himself, his servants, &c., to pass and repass, and to carry all things necessary for his business as a coal and timber merchant; and that the defendant had deprived him of all benefit, profit, and use of the said way, by laying large quantities of earth and rubbish, by which the way was totally obstructed, and the plaintiff prevented from enjoying his premises and carrying on his trade in so advantageous a manner as he had a right to do, and the plaintiff was obliged to carry his coals, timber, &c., by a circuitous and inconvenient way. The evidence was that the way in question was a public highway, which the defendant had obstructed by laying on it several cart-loads of soil and rubbish, which had produced the grievance to the plaintiff complained of in the declaration. When the case was opened, Lord Kenyon expressed a doubt whether the action was maintainable, and whether the only remedy the plaintiff had was not by indictment as a public nuisance. Erskine, for the plaintiff, conceded, that, for a public nuisance, the remedy was by indictment only, unless the party had sustained a special injury; and he cited Co. Litt. 56. a. to that effect: but he contended that the obstruction complained of by the declaration was such a particular and special injury and grievance as entitled the party to his remedy by action. Lord Kenyon said "that the general principle as

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As to whether
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to the maintenance of actions for injuries of this description was as stated by Mr. Erskine; but he was of opinion that the grievance complained of in the declaration was not of that description which entitled the party to maintain an action; that it was an injury to the king's highway, a public nuisance, and the party's remedy was by indictment only; and that the action therefore could not be sustained; and this ruling was acquiesced in by the court. In *Greenly v. Codling*, 2 Bing. 263, 9 Moberg, 469, where it was held that the being delayed four hours by an obstruction in a highway, and thereby being prevented from performing the same journey as many times in a day as if the obstruction had not existed, is a sufficient injury to entitle the party to sue for the obstruction; the injury was direct and immediate. So, in *Twiss v. Moore*, 1 Edw. Raym. 486, 1 Salk. 15, Holt, 10, Carth. 451, 12 Mod. 262, the injury was confined to the individual proprietor of the colliery. Here, however, the injury was common to all persons having shops in, or being in the habit of using, the way in question; and it would be extremely inconvenient to hold that an action would lie at the suit of every one of those individuals. 8. As to the reduction of damages— it was contended that, the act requiring the action to be brought within six months of the cause of action, and each day's continuance of the obstruction constituting a new cause of action, the plaintiff could only be entitled to recover in respect of the two days that fell within the six months.

Third point—
 As to the reduction of damages.

Wilks and Merewether, Serjeants, now shewed cause.

First point.

1. The act of parliament (s. 64) empowered the company to build over the site of the old way, provided they opened a new one in the manner therein directed. The opening of a new way was a condition precedent to their right to obstruct the old one: consequently, until the opening of the new way, the public were never legally deprived of the

ancient way. At all events, the company had no authority to exclude the public for an unreasonable length of time. The objection is clearly without foundation. 2. Undoubtedly a mere general interruption of a right of way, not followed by an immediate and peculiar injury to an individual, will not give a right of action: but, where, in addition to the public grievance, an individual sustains a private damage, he is not bound to resort to an indictment, but may recover a compensation for any injury resulting therefrom that peculiarly affects himself. In the Year Book, Michaelmas, 28 Hen. 8, 27—where the defendant had stopped the highway, so that the plaintiff could not go to his close adjoining the way;—Baldwin objected that the action would not lie; that the king had the punishment of it as a common nuisance to all the king's subjects; for, "by the same reason that one could have an action, all could, and then the defendant would be punished a hundred times for the same offence." Fitzherbert, contra—"Where one has a greater hurt or inconvenience than another, he who has the greater hurt can have his action to recover his damages which he had for that special hurt. If a man makes a ditch in a highway, and I and my horse fall into it, there, as I sustain great damage, I shall have an action for it, because I am more damaged than another man. Therefore, as the plaintiff had more convenience by that highway than others, and more damage by the stopping of it, because he had no other way to go to his close, he will have his action upon the special matter. But, if he has not greater damage than any other, then he will not have an action." *Fiscus v. Howenden*, Cro. Eliz. 664, is to the same effect. And both these cases are cited and approved of by Lord Coke, in his 1st Inst. 64 a. So, in *Maynell v. Saltmarsh*, 1 Keb. 847, the obstruction of a public way, accompanied with a particular special damage to an individual, was held to give a right of action. In *Hart v. Basset*, Sir T. Jones, 156, 4 Vin. 519, pl. 7, in case for erecting a ditch and a gate on a

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highway, whereby the plaintiff could not carry his fishes from his close to his barn, but was obliged to carry them by a longer and more difficult way; after verdict for the plaintiff, a motion was made in arrest of judgment, that the injury was a common nuisance, and the verdict would lead to multiplicity of actions; and Co. Litt. 56. m. was cited; but it was resolved by the whole court that the action lay; for they said that this rule that an action will not lie for that which every one suffers, ought not to be taken too largely; for in this case the plaintiff sustained a particular damage; for the labour and pains he was forced to take with his cattle and servants by reason of this obstruction, might be of more value than the loss of a horse, which has been holden to be sufficient damage to maintain such actions: In *Pair v. Patrick and Others*, 8 Mod. 289; Carth. 191, which was an action on the case against the defendants for not keeping an ancient ferry boat, whereby the plaintiff lost his passage—it was resolved (Carth. 198) “that the plaintiff cannot have this action, because the ground of it is for a common nuisance, for which an action will not lie unless there is some special damage alleged; or where the party grieved can have no other remedy; but in this case the plaintiff had not declared upon any particular damage, but generally, that he had lost the liberty of the passage &c., and therefore this action will not lie; and chiefly to avoid multiplicity of actions; for, by the same reason that it may be brought by the plaintiff, it may be maintainable by every person passing that way.” In *Jones v. Moore*, 1 Salk. 16; 1 Ld. Raym. 486, Com. 58, 12 Mod. 262, in case, the plaintiff declared that he was possessed of a colliery, and that there was a highway near, by which he used to carry his coals; and that he had a certain quantity of coals dug ready for sale; and that the defendants dug a colliery near his; and, intending to draw away his customers, and deprive him of the profits of his colliery, stopped up the said way, so as carts and carriages

could not come to his colliery; per quod the plaintiff per totum tempus prædictum totaliter perdidit the benefit and profit of his colliery, and his coals dug out of his said colliery magnopere depretiati et deteriorati devenerunt, pro defectu emptorum ex causa prædicta sic impeditorum &c. On motion in arrest of judgment—"All the court agreed (1 Salk. 15) that, where an action arises from a public nuisance, there must be a special damage; for, be that did the nuisance is punishable at the suit of the public; and to allow all private persons their actions without special damage, would create an infinite and endless multiplicity of suits." Gould, J., there cited a case of *Baker v. Moore*, Hilary, 8 Will. 3, C. B. (1 Ld. Raym. 491), "where in case the plaintiff declares, that there was and time whereof &c. had been quædam communis via in Lambeth, duceus from the river Thames, in, per, et trans a certain place called Bark Lane usque ad such a place &c., that the defendant erected a wall across the said way, which stopped the passage, and continued it from such a day until the impetration of the plaintiff's original writ, ita quod ligei domini regis could not use the said way as before &c., per quod tenantes diversarum messuagiorum of the plaintiff, situate in &c., a messuagis &c. recesserunt &c., per quod the plaintiff lost the profits of his houses &c. And J. O., then king's serjeant, moved in arrest of judgment, that the action would not lie—because this damage was not special enough; but the whole court was of another opinion, and over-ruled it." In *Chichester v. Lethbridge*, Willes, 71, it was held that an action will not lie by an individual for an obstruction in a public highway unless he sustain a particular damage, which must appear on the record; but, if the plaintiff state that the defendant obstructed &c., by a ditch and gate across the road, by which the plaintiff was obliged to go a longer and a more difficult way, and that the defendant opposed him in attempting to remove the nuisance; this is sufficient damage to support the

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action (a). *Rose v. Miles*, 4 M. & S. 101, is also a strong authority for the plaintiff: there, the plaintiff declared, that, before and at the time of committing the grievance, he was navigating his barges laden with goods along a public navigable creek, and that the defendant wrongfully moored a barge across, and kept the same so moored from thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden, per quod the plaintiff was obliged to convey his goods a great distance over land, and was put to trouble and expense in the carriage of his goods over land and it was held that this was such a special damage for which an action upon the case would lie. Lord Ellenborough there said: "In *Hubert v. Groves*, the damage might be said to be common to all; but this is something different, for, the plaintiff was in the occupation, if I may so say, of the navigation; he had commenced his course upon it, and was in the act of using it when he is obstructed. It did not rest merely in contemplation. Surely this goes one step further; this is something substantially more injurious to this person than to the public at large, who might only have it in contemplation to use it. And he has been impeded in his progress by the defendants wrongfully mooring their barge across, and has been compelled to unload and to carry his goods over land, by which he has incurred expense, and that expense caused by the act of the defendants. If a man's time or his money are of any value, it seems to me that this plaintiff has shewn a particular damage." In *Greasly v. Codling*, Best, C. J., says: "I cannot distinguish *Rose v. Miles* from the present case; in that, as in the present, the nature of the injury appeared upon record, and it resembled that of which the plaintiff complains in all respects except that the public way was a canal instead of a road, and the party was

(a) See Com. Dig. *Action upon the Case for Nuisance*, (C).

obstructed by a barge instead of a gate." In *Wiggins v. Boddington*, 3 C. & P. 544, it was ruled by Best, C. J., that a dock company having a swing bridge on a public highway are bound, on the passing of vessels, to use all reasonable means (both as to the number of men employed, and number of ships passed at a time) to prevent unnecessary delay; and if any one is obstructed in consequence of their neglect, such obstruction will render them liable in damages for the injury sustained. Lord Chief Justice Abbott, in delivering the judgment of the court in *Duncan v. Thwaites*, 5 D. & R. 479, incidentally says: "I take it to be a general rule that a party who sustains a special and particular injury by an act which is unlawful on the ground of public injury, may maintain an action for his own special injury." In the present case, the plaintiff has unquestionably sustained a particular injury in the loss of business, in addition to the general injury and inconvenience he suffered in common with the rest of the public in being deprived of the use of the way for what the jury have found to be an unreasonable and unnecessary length of time. 3. As to the reduction of damages—The injury of which the plaintiff complained was found by the jury to have endured from the 2nd April until the 2nd July, and the action, which was brought on the 30th December, was consequently commenced in due time—within six months after the cause of action had arisen. In *Roberts v. Read*, 16 East, 215, it was held, that, though the general highway act, 13 Geo. 3, c. 78, s. 81, directs that actions against any persons for anything done or acted in pursuance thereof shall be commenced within three calendar months after the fact committed, and not afterwards; yet, if surveyors of highways, in the execution of their office, undermine a wall adjoining to the highway, which does not fall till more than three months afterwards, they are subject to an action on the case for the consequential injury within three months after the falling of the wall. So, in *Gillon*

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v. Boddington, 1 C. & P. 544, R. & M. 161; where by a private act of parliament it was enacted that the London Dock Company should be sued within "six calendar months after the fact committed"—it was held that the limitation ran from the time of the consequential injury happening, and not from the doing of the act which caused that consequential injury; the act itself not being tortious or injurious, except from those consequences which occurred some time after (a). These cases shew that limitations of this sort are not to be applied with the same strictness to actions on the case as to actions of trespass. The clause, too, it is to be observed, is the language of the promoters of the act, and ought to be construed with all possible strictness against them. It is enough if any portion of the injury was sustained by the plaintiff within six months, the period limited.

First point.

Kelly and Channell, in support of the rule.—The action is misconceived. The right of way claimed by the declaration had lawfully ceased to exist at the time of the alleged grievance. The company were by the 64th section authorised permanently to stop up the courts and passages therein enumerated; and the opening of the new way was not a condition precedent to their right to stop up the old one; for, had this been so, the original stoppage would have been unlawful, which is not contended on the part of the plaintiff. The declaration charges the defendants with having wrongfully and injuriously kept and continued

(a) See *Lloyd v. Wigney*, 4 M. & P. 222, 6 Bing. 489. The Brighton paving and improvement act, 6 Geo. 4, c. clxxiv, s. 255, enacts that actions against persons proceeding under the act shall be brought within six calendar months next after the matter or thing done. The treasurer,

surveyor, and contractors under the act, dug a sewer near the plaintiff's house, in consequence of which the foundation was sunk, and the walls were cracked: it was held that the plaintiff's right of action was limited to six months from the day the cracks were occasioned.

the thoroughfares in question shut and closed up for an unreasonable and unnecessary length of time—assuming that it was lawful for them to stop them up for a *reasonable* time. That, however, is not the proper construction of the act. The company were empowered by the act to build over the ancient ways, and to re-open within a convenient time a new way in lieu of them. At all events, the old way, if not extinguished, was at least suspended; for, it is not necessary to contend that the old rights would not revive, provided the new way were never opened. The right of way, therefore, claimed by the declaration had clearly ceased to exist before the commencement of the action; or, if it did exist, the action is misconceived—it should have been for not opening the new way within a reasonable time (a).

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It may be conceded, that, if a direct, immediate, and particular damage results to an individual from an act that is injurious to the public generally, and for which the party doing the act would be subject to an indictment, an action might still be maintained by the individual. But if the injury, of which he complains is one that is sustained by him in common with a large class of the public, then the only remedy is by indictment. The only case that approximates in principle to the present is that of *Hubert v. Groves*, where it is broadly laid down by Lord Kenyon, that, for any obstruction to a public highway, which is a public nuisance, though a party's business should be thereby obstructed, an action on the case cannot be maintained by the person so obstructed; but the only remedy is by indictment. In the present case, the plaintiff is only injured through the injury inflicted upon the public. *Hubert v. Groves* is said to have been qualified by subsequent

Second point.

(a) See *Henley v. The Mayor &c. of Lyme Regis*, 3 M. & P. 278, 5 Bing. 91; *The Mayor &c. of Lyme Regis v. Henley*, 3 B. & Ad.

77, in error, K. B.; and the same case in error in the House of Lords, 1 Scott, 29, 1 New Cases, 222.

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cases—particularly by *Rose v. Miles* and *Greasley v. Codling*. But in each of these cases the injury was confined to the plaintiff, and was the immediate and necessary result of the illegal act complained of. If this plaintiff be held entitled to maintain his action, the consequence will be that every tradesman on the line from the Adelphi to Whitehall will in like manner be entitled to claim compensation for any imaginary loss of custom occasioned by the obstruction of the way in question. This would be extremely inconvenient, and it is the reason why actions have never been allowed to be maintained, where the like special damage is incidental to and has been sustained by a large class of persons. Suppose an obstruction in any great leading thoroughfare in this metropolis—Fleet-street, for example—occasioned by the commissioners of sewers or any other public body, and continued for a period that a jury would be warranted in saying was unreasonable, it is clear that an individual who might sustain an injury by driving against it would be entitled to sue: but, could every tradesman on the line of road from Hyde Park Corner to Whitechapel Church maintain an action against the parties causing the obstruction, to recover compensation for the loss of profits he *might* have made from customers who *might* have come to his shop had the obstruction not existed?

Third point.

The damages must, at all events, be reduced. The limitation contained in the 93rd section of the act withdraws from the consideration of the court and jury all that took place anterior to the six months.

TINDAL, C. J.—It appears to me that this rule, except as to that part of it which prays that the damages may be reduced, ought to be discharged. The action is brought to recover a compensation for an injury peculiarly resulting to the plaintiff by the obstruction of a public right of way. The declaration describes the way as leading from the

Adelphi to Craven Court, and from thence through Northumberland Passage to Whitehall; and also from the Strand into Craven Court, and from thence through Northumberland Passage to Whitehall: it then proceeded to allege that the plaintiff was possessed of a messuage and premises situate partly in Craven Street and partly in Northumberland passage, in which premises he carried on the business of a bookseller; and that his trade was obstructed and injured in consequence of the defendants keeping the thoroughfares leading from the Adelphi to Craven Court and from the Strand to Craven Court, and also Craven Court, shut up for an unreasonable and unnecessary length of time. The jury found that the defendants did continue the obstruction an unreasonable and unnecessary length of time after the 2nd April, 1833. 1. The first objection urged on the part of the defendants was, that, by the act incorporating the Hungerford Market Company, the right of way so alleged in the declaration was, on the 3rd April, 1833, stopped up and extinguished. It appears to me that, upon the proper interpretation of the act, this is not the case. I am ready to admit, that, if it were so, a material allegation must have been found against the plaintiff. In support of this objection the defendants rely upon the 64th section of the act. Except by that section the company had no power to stop up ways: and without a temporary suspension of the rights of the public it would have been impossible to carry on the projected works. Looking at that clause, it seems to have been contemplated that certain buildings should be erected upon the site of One Tun Court and Heel Alley, whereby the old right of way through those places would be wholly and for ever extinguished. The clause, therefore, gives power to the company permanently to obstruct those ways: it provides, "that, in erecting the several buildings thereinbefore authorized to be erected, it shall be lawful for the company to build on so much of the places called One Tun

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Court, Heel Alley, and Charles Court, as are bounded by and included between any of the messuages and buildings therein authorized to be pulled down, and thereby to stop up the way or passage over the same parts of the said courts and alley : provided always that the said company do make an avenue from the said market to and in a straight line with Duke Street, in the Adelphi, of the width of twelve feet, and underneath some of the buildings to be erected pursuant to the act." The only obstruction, therefore, to the rights of the public that is contemplated by that section was, the obstruction to be occasioned by the erection of the new buildings. That, however, was not the cause of the obstruction complained of in this case : such injury appears to have been occasioned by the putting up of certain hoards at an earlier period of the work, and the keeping them up for an unreasonable length of time, viz. down to the 2nd January, 1833. Upon the construction of the act, therefore, I say that the obstruction not having been occasioned by the buildings themselves, but by something preliminary thereto, the case does not fall within the 64th section, but rests upon the general right the defendants possessed to do all that might be necessary to enable them to carry into effect the objects of the act : and that right the jury by their finding have declared to have been abused. Upon a due consideration therefore of the act of parliament the first objection appears to me to fail. It is contended, however, that the plaintiff has misstated his complaint—that, instead of charging the defendants with obstructing the original way, he should have charged them for not opening the new passage within a reasonable time. It seems to me to be very much *ad idem* whether the gravamen be charged in the one way or the other. The plaintiff's cause of action was the obstruction he found at the time he brought the action : what he complains of is, that the defendants suffered the obstruction to exist for an unreasonable period ; and he had a right to complain of

that which was the immediate and proximate cause of his loss. 2. The next question is, whether the present plaintiff has suffered such a particular private damage beyond the rest of his majesty's subjects as to entitle him to maintain the action. In conformity with the greater number of the cases cited, I think this was such a peculiar injury to the plaintiff as to entitle him to sue. The public injury is, that individuals in the habit of using the way in question, are deprived of the use of it in so convenient a manner as they were accustomed to have: and for this, undoubtedly, no action could be maintained by any one, otherwise the parties would be liable to an overwhelming number of suits. But, from the Year Books down to the latest decision upon the subject, the law has always been that a party who suffers a particular injury beyond that which affects the public in general, may maintain an action in respect of such particular injury. The question is, whether this case falls within that class. The plaintiff is not only obstructed and prevented from using the right of way in common with the rest of the public, but his trade is injured by the passers-by being prevented having access to his shop. Every individual had the right of way; but each individual had not a shop which depended for its trade upon such of the public as were in the habit of using the way. The same observations occur in *Baker v. Moore*, cited by Gould, J., in *Iveson v. Moore*, where, in case, the plaintiff declared that there was and from time whereof &c. had been quædam communis via in Lambeth, ducens from the river Thames in, per, et trans a certain place called Bark Lane usque ad such a place &c., that the defendant erected a wall across the said way, which stopped the passage, and continued it from such a day until the impetration of the plaintiff's original writ, ita quod ligei domini regis could not use the said way as before &c., per quod tenentes diversorum mesuagiorum of the plaintiff situate in &c., a mesuagiis &c. recesserunt &c., per quod the plaintiff

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lost the profits of his houses, &c. And it was moved in arrest of judgment, that the action would not lie—
 1. because this damage was not special enough; but the whole court was of another opinion, and over-ruled it:
 2. because he should have named his tenants in particular; sed tot. curi. contra. So, in *Baker v. Moore*, the prevention by a public nuisance of customers from coming to a colliery, per quod the benefit of the colliery was lost, and the coals dug up depreciated, was holden to be such a special damage as would enable a man to maintain an action. Indeed, the only question in these cases is, whether the injury to the individual is so proximate as to be the direct, immediate, and necessary consequence of the public injury. The case principally relied on by the defendants is that of *Hubert v. Groves*. It is certainly very difficult to distinguish that case from the two I have just adverted to, and from others that were cited in argument on the part of the plaintiff. It is to be observed that the injury there complained of, viz. the obstruction of a public highway, whereby the plaintiff was compelled to travel by a more circuitous and inconvenient route, was precisely one common to all the rest of the king's subjects. If that be not a sufficient distinction between *Hubert v. Groves* and the present case, I can only say that I yield to the greater authority of the decisions by which that case has been preceded and succeeded. 3. The third question is, whether the action was commenced in time to entitle the plaintiff to recover the whole amount of the damages found by the jury. The cause of action ceased on the 2nd July, 1833. The action was brought two days within the six months after the cesser of the cause of action, viz. on the 30th December, 1833. The 93rd section of the act provides that "no action shall be brought against any person for anything done in pursuance of the act or the powers thereby given, until twenty-eight days' notice shall have been given in writing to the defendants, signed by the attorney for the plaintiff, specifying the

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cause of action; or after six months after the cause of action shall have arisen; and the defendants in every such action may plead the general issue, and give the act and the special matter in evidence, and that the same was done in pursuance of the act." It appears to me, that, although the cause of action began to accrue on the 3rd April, each day of the continuance of the obstruction enured as a new cause of action and a new ground of complaint on the part of the plaintiff. Although inconvenient consequences may result from this determination, we can only construe the act as we find it. I think the plaintiff is only entitled to recover for the two days; and consequently that part of the rule which prays a reduction of the damages must be made absolute.

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PARK, J.—I agree that the general principle which governs cases of this description is as stated by the Lord Chief Justice. Where the injury is one that is common to the public, the only remedy is by indictment; but, where an individual, besides the general inconvenience, sustains a peculiar private damage in consequence of the unlawful act, there an action also will lie. We have been much pressed by the decision of Lord Kenyon in the case of *Hubert v. Groves*. Entertaining as I do the greatest possible respect for the learning and ability of the highly gifted individual who decided that case; yet, looking at all the cases in which this point has arisen both before and since *Hubert v. Groves*, I cannot bring myself to think that that case is entitled to so much attention as are most of the judgments of that learned judge. *Iveson v. Moore* is scarcely to be distinguished from the present case. *Baker v. Moore* also fully supports the doctrine we are endeavouring to lay down: and, although there was at first a difference of opinion amongst the judges, not upon the general principle, but upon its applicability under the particular circumstances of the case; yet, when the case was afterwards argued at Serjeants' Inn, they were

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all of opinion for the plaintiff, that the action well lay. So, here, the plaintiff sustained an injury in the loss of the profits that would have accrued to him had not his customers been prevented from coming to his shop. These two cases of *Iveson v. Moore* and *Baker v. Moore* occurred before *Hubert v. Groves*. Two cases, of which I am not disposed to disapprove, have been determined since—viz. *Rose v. Miles* and *Greasly v. Codling*. In the latter, the plaintiff was delayed by an obstruction in a highway, and thereby prevented from performing the same journey as many times in a day as he would have done had the obstruction not existed; and this was held to be such an individual and particular injury as to entitle the plaintiff to maintain an action. And in *Rose v. Miles*, where the plaintiff declared, that, before and at the time of committing the grievance, he was navigating his barges laden with goods along a public navigable creek, and that the defendant wrongfully moored a barge across, and kept the same so moored, and thereby obstructed the said public navigable creek, and prevented the plaintiff from navigating his barges so laden, per quod the plaintiff was obliged to convey his goods a great distance over land, and was put to trouble and expense—it was held that this was such a special damage for which an action upon the case would lie. *Wiggins v. Boddington* is also a strong authority to the same effect. All the cases underwent considerable discussion in *Henley v. The Mayor and Burgesses of Lyme Regis*, where this court held that an action lay at the suit of an individual against the defendants for an injury resulting to the former in consequence of the non-repair of certain sea walls which the latter were by their charter made liable to repair: and this was confirmed by the court of King's Bench and in the House of Lords. The objection to the form of the declaration has been sufficiently commented upon by his Lordship: and, with respect to the damages, I feel sorry

to be obliged to concur with the rest of the court in saying that they must be reduced.

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GASELER, J.—Upon two of the points I agree with the rest of the court: but, on the other, viz. as to the sufficiency of the declaration, I am sorry to say that I am not prepared to concur with them. The declaration complains not of the stopping up of the way, but of the continuing it stopped up for an unreasonable and unnecessary length of time: it begins with stating, that, before and at the time of the committing of the grievances, there was and still of right ought to be a certain public footway, passage, or thoroughfare over the locus in quo. It seems to me that the declaration should not have stated that there *then* was a right of way over the locus in quo; for, it appears that the way in question had already, whether properly or improperly, been permanently closed. In all the precedents applicable to similar cases, it is alleged that the defendant kept and continued the obstruction which he had before then improperly made or caused to be made. It occurs to me also that the shape of the action is incorrect. The true gravamen is that the defendants neglected and delayed the opening of the new way for an unreasonable length of time. There being in the act no provision making the opening of the new way a condition precedent to the right of the company to stop up the old one, they had a right, under the 64th section, to close the antient way. All that the act required of them was, that they should open a new passage or arcade of given dimensions within a reasonable time.

BOSANQUET, J.—Three questions have arisen in this case—first, whether any right of way in fact existed at the time of the continuance of the obstruction complained of—secondly, whether the plaintiff has sustained such a peculiar private injury as to entitle him to maintain the

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action—thirdly, to what extent of damages he is entitled to recover. 1. The first is a mere technical objection, altogether unconnected with the merits of the case; and I am of opinion that it is not well founded. The 64th section of the act authorized the company to obstruct the way in question. They were to be at liberty ultimately either to close the old way altogether, and open a new one, or to re-open the old way. They were not called upon to open the new way until such time as the buildings over the spot in question should be completed, provided that should be done within a reasonable period. Here, the jury have found that the obstruction was continued for an unreasonable and unnecessarily long period; which is what the plaintiff by his declaration complains of. If the old way had been re-opened, it might have been treated as a continuance of the original right of way. 2. The main question, however, is the second, which depends upon a principle that is well acknowledged, but as to which some difficulty occurs in its application. It is by no means difficult to suggest extreme cases that one would not hesitate to hold not to fall within this principle; which is, that if, in consequence of the obstruction of a public right, a private individual sustains a particular injury beyond that which is common to all the king's subjects, although an indictment lies, an action may still be maintained by the individual. In the present case, the plaintiff complains not of the inconvenience he sustains in common with the rest of the public, but that the customers who had been in the habit of resorting to his shop, have been by the obstruction prevented from so doing, and thereby the profits of his trade have suffered a diminution. This is an injury peculiarly affecting the plaintiff. It may be that other individuals may also have sustained particular injury. We have been asked, by way of illustration, whether, in the event of an indictable obstruction occurring in any great thoroughfare, (Fleet Street, for ex-

ample, where each house contains a shop), every individual who might thereby encounter loss of custom could maintain an action. That is an extreme case, which we shall be prepared to deal with whenever it shall arise: at present, it is enough to say that the injury of which this plaintiff complains is peculiar to himself. The strongest authority that has been cited on the part of the defendants is that of *Hubert v. Groves*, which certainly very nearly resembles the present case. We must, therefore, see whether that case is sanctioned by the preceding authorities, or whether it has since been confirmed. *Baker v. Moore* is a very strong authority the other way. The nuisance there complained of consisted in the erection of a wall across a way, whereby the plaintiff's tenants were prevented from passing. For the mere deprivation of the use of the way, neither the plaintiff nor his tenants could have maintained any action: but the injury that was made the foundation of the action in that case was, that, in consequence of the obstruction, the plaintiff lost his tenants, and thus his property was deteriorated. That appears to me to be precisely this case. It was decided before *Hubert v. Groves*; and, had the matter rested there, we might probably have concluded that Lord Kenyon did not approve of it. But we have the deliberate opinion of the court of King's Bench in a later case—*Rose v. Miles*—in accordance with *Baker v. Moore*. There, the injury complained of was the mooring of a barge across a public navigable creek, whereby the plaintiff was compelled to convey his goods over land at considerable expense. *Greasly v. Codling* goes even further than the last case. Upon the whole, I think the balance of authority and the reason of the thing are both in favour of the maintenance of this action. 3. As to the damages—inasmuch as the cause of action first arose on the 2nd April, 1833, and continued to the 2nd July, and as each day of the continuance of the obstruction gave a new right of action, the

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plaintiff is only entitled to recover in respect of the two days that are left uncovered. The damages must therefore be reduced to 13*s.* 4*d.*

Rule absolute accordingly.

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By a judge's order a cause and all matters in difference between the parties were referred to arbitration, the costs of the suit, and of the reference and award, to abide the event of the award. The arbitrator by his award directed, that the defendant should by a given day deliver to the plaintiff certain goods, and that the plaintiff should on or before a certain other day pay a sum of money to the defendant; that, upon payment of the sum so awarded, the proceedings in the action should cease; and that each party should execute to the other a general release:—Held, that the award was sufficiently final, and that neither party was entitled to costs.

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ASSUMPSIT for flints bargained and sold, and for the use and occupation of a gravel pit. By an order made in the cause on the 9th April, 1835, all matters in difference between the parties were referred to the award of a layman, who was to make his award "on or before the 20th May next ensuing, or before such further day as the said arbitrator should appoint and signify in writing from time to time to be indorsed hereupon: and it was ordered that either party should be at liberty to enter up final judgment upon the award for so much money (if any) as the arbitrator should by his award find to be due to him; and that the costs of the suit, and also the costs of the reference and award, should abide the event of the award."

The arbitrator by his award, dated the 24th July, 1835, after reciting that he had, by three several indorsements on the said order, bearing date respectively the 19th May, the 30th June, and the 15th July, duly enlarged the time for making and publishing his award until the 25th July, ordered "that the defendant should on or before the 25th August deliver or cause to be delivered at the wharf of Mr. S. Courts, 744½ yards of flints, and that the plaintiff should be at liberty to remove the said flints from the said wharf without any hindrance or interruption by or from the defendant; and that the plaintiff, his executors or administrators, should pay or cause to be paid to the defendant, his executors, or administrators, on the 12th October, the sum of 59*l.* 19*s.* 7½*d.*: and further, that, upon payment of the said sum of 59*l.* 19*s.* 7½*d.* to the de-

defendant, all proceedings in the aforesaid action should cease, and that the defendant and plaintiff should respectively, at the costs and charges of the party requiring the same, execute to each other mutual general releases in writing of all and all manner of action and actions &c."

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Busby, on a former day in this term, on the part of the plaintiff, obtained a rule nisi to set aside the above award, on the ground that it was doubtful on the face of it what was the legal event of the award, so as to entitle either party to the costs.—He cited the case of *Leeming and Fearnley*, 5 B. & Ad. 403. There, a replevin suit and all matters in difference touching the distress were referred to arbitration: the costs of the suit to abide the event. The arbitrator awarded that the rent was 14*l.*, and that 6*l.* were due for rent at the time of the distress; that the plaintiff in replevin should pay the 6*l.*; and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed. It was held that the award did not shew who ought to pay the costs, which were to abide the event of the suit; and, consequently, that it was not final.

Addison shewed cause.—The award is final: the action is put an end to. The event of the award is partly in favour of the plaintiff and partly in favour of the defendant; consequently neither party is entitled to costs. The arbitrator was not bound to make such an award as would give the costs to the one or the other of the parties. In *Jackson v. Yabsley*, 5 B. & A. 848, the court say: "It is sufficient, if, looking at the whole award, it appears that the matter is determined." So, in *Blanchard v. Lilly*, 9 East, 497, an award that certain actions be discontinued and each party pay his own costs, was held to be final and good, being in effect an award of a stet pro-

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cessus. The case of *Boodle v. Davis*, 4 N. & M. 788, seems to be precisely in point: it was there held, that, where, by an agreement of reference, after reciting various disputes and claims by A. and B. (the parties to the agreement), and that an action of trespass had been commenced by A. against B., "the aforesaid matters" are referred to C., and it is agreed that all the costs shall *abide the event of the award*, C. cannot make any award as to the costs: and, unless C. decides *all* the matters referred to him in favour of one party, the plaintiff and defendant must pay their own respective costs; even though the arbitrator decides that the defendant has committed a trespass on the plaintiff's land. Patteson, J., there says: "There being many matters in difference which are referred, and it being directed that the costs shall abide the event of the award, it seems to follow that each party must pay his own costs, unless *all the matters in difference are decided in favour of one of them*." In *Norris v. Daniell*, 4 M. & Scott, 383, 10 Bing. 507, a cause (the declaration in which contained eight counts) and all matters in difference between the plaintiff and defendant were referred; the costs of the cause, and of the reference and award relating thereto, to abide the event: the arbitrators found that the plaintiff had good cause of action in respect of the matters charged in five of the counts, and awarded 5*l.* damages, and directed that no further proceedings should be had in the cause; but made no specific award as to the three remaining counts: it was held that the award was not final, there being no determination as to the three last-mentioned counts, and consequently no legal event as to them to authorize the taxation of costs thereon. But, in *Dibben v. The Marquess of Anglesey*, 10 Bing. 568, where, in trespass, the defendant pleaded the general issue and several justifications, and the cause was referred to an arbitrator, the costs to abide the event; the arbitrator awarded for the defendant on the general

issue, and disposed of the rights contested in the pleas of justification, but did not in his award decide on or notice the issues upon those justifications: and the court refused to set aside the award. Lord Lyndhurst, C. B., said: "After finding that the defendants had not committed the trespasses, any inquiry into the truth of the special pleas could only have been material with reference to the question of costs. If either party wished to have a decision upon the special issues with that view, he should have distinctly requested the arbitrator to take that course. It is not suggested by the affidavits that any such request was made. I think the arbitrator has substantially disposed of the matters referred to him." In *Leeming and Fearnley's* case, Parke, J., in the course of the argument (5 B. & Ad. 404) says: "It is consistent with the award that the defendants may have avowed for a different rent from that actually reserved:" and this suggestion is borne out by the fact; for, it appears from another report of the case (2 N. & M. 232), that the defendants avowed for rent due under a demise at 15*l.* per annum, upon which issue was joined; and the arbitrator found that the rent reserved was 14*l.*

Busby, in support of his rule.—Upon the face of this award it is uncertain which party is entitled to costs. The arbitrator directs certain acts to be done by each. The meaning of the order of reference clearly was that the entire costs of the suit, and of prosecuting the reference, were to abide the event of the arbitrator's judgment. As far, therefore, as the costs are concerned, it is impossible to say in whose favour this award is made. *Leeming and Fearnley's* case is precisely in point. The court there say: "It must appear by the award that the action is finally determined in favour of one of the parties, or else it cannot be determined how the costs are to go." There, as here, the arbitrator directed mutual releases to be given:

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and that is tantamount to awarding a *stet* processus. *Norris v. Daniell* is also an authority for the plaintiff. Park, J., there says: "Where a cause and all matters in difference are referred to an arbitrator, and the costs are directed to abide the event, he must decide on the whole cause; otherwise there is as to part no such legal event as will authorize the taxation of the costs."

TINDAL, C. J.—The only objection made to this award is, that it does not clearly shew by whom the costs are to be paid. By the order of reference, the cause and all matters in difference were referred, and it was provided, "that the costs of the suit, and also the costs of the reference and award, should abide *the event* of the award." The question is, whether this award is bad; or, if good, what is the event of the award. The arbitrator directs, that the defendant shall, on or before the 25th of August, deliver at a certain wharf 74½ yards of flints, and that the plaintiff shall be at liberty to remove the same without interruption; and that the plaintiff shall pay to the defendant, on the 12th of October, 59*l*. 19*s*. 7*d*.; and, further, that, upon payment of that sum to the defendant, all proceedings in the action shall cease, and that the parties shall respectively execute releases. It does not appear to me that the award is bad because it directs something to be done by either party. The event is partly in favour of the one party, and partly in favour of the other. I think neither party is entitled to costs. The case is perfectly distinct from *Leeming v. Fearnley*: there, the arbitrator was required by the order of reference to make an end of the suit, and he failed to do so. I think the rule must be discharged.

PARK, J., was at chambers.

GASELEE, J.—I am of the same opinion. Each party

must pay his own costs. The case comes very near that of *Boodke v. Davis*.

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BOSANQUET, J.—I am also of opinion that this rule ought to be discharged. The costs being directed to abide the event of the award, and the event being partly in favour of the plaintiff and partly in favour of the defendant, no costs are payable on either side.

Rule discharged.

MUNK v. CLARK.

Friday,
Nov. 20th

ASSUMPSIT for money had and received, &c.—Plea, the general issue. The action was brought to recover a sum of 80*l.*, alleged to have been received by the defendant to the plaintiff's use. The cause was originally tried before Gaselee, J., at the Sittings at Westminster, in Hilary Term, 1833, when a verdict was found for the plaintiff. A case was afterwards stated for the opinion of the court; and in Trinity Term following a new trial was directed, the court holding that the facts set forth in the special case did not warrant a verdict for the plaintiff. See the report, 3 M. & Scott, 463, 10 Bing. 102. A second trial was accordingly had before Tindal, C. J., at the Sittings after Michaelmas Term, 1833, when a special verdict was returned, and ultimately settled by his lordship, to the following effect:—

That, on the 28th of July, 1824, a commission of bankrupt issued against the plaintiff on the petition of John

A commission of bankrupt issued against the plaintiff, in July, 1824, under which he was declared a bankrupt. At the time of issuing the commission the plaintiff was not indebted to the petitioning creditor in the sum of 100*l.*; and the plaintiff disputed the validity of the commission on that ground. In January, 1831, the plaintiff applied to one of the commissioners of the court of Bankruptcy to appoint an official assignee under the com-

mission, as well for the purpose of investigating the petitioning creditor's debt as for the purpose of taking care of the property of the estate. The defendant was accordingly appointed official assignee for the purpose aforesaid, but he never received any notice that the plaintiff disputed the commission, or that he (the defendant) was appointed for any special purpose:—Held, that the fact of the plaintiff having himself put the commissioner in motion, and thereby caused the appointment of an official assignee, did not estop him from suing the defendant for money received by him as assignee.

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Foster, under which commission the plaintiff was declared a bankrupt by the commissioners named in the said commission, and Foster chosen sole assignee under the said commission, and the estate and effects of the plaintiff assigned to him by the commissioners; but that, at the time of issuing the said commission, the plaintiff was not indebted to Foster in the sum of 100*l.*; that, after the issuing of the commission, the plaintiff did dispute the validity of the commission on the ground of the alleged insufficiency of the petitioning creditor's debt; and that, on the 23rd January, 1831, the plaintiff applied to C. F. Williams, Esq., one of the commissioners of the court of Bankruptcy, to appoint an official assignee to the said commission, as well for the purpose of investigating the said petitioning creditor's debt, as for the purpose of taking care of the property of the estate; and that the said commissioner, on the application of the plaintiff for the appointment of such official assignee, appointed the defendant an official assignee of the estate and effects of the plaintiff under the said commission for the purposes aforesaid; but that the defendant never received any notice that the plaintiff disputed the said commission, or that the defendant was appointed for any special purpose. That the defendant received from a tenant of certain premises belonging to the plaintiff the sum of 18*l.* 5*s.* 9*d.* due for rent thereof, and retained the same in his own hands at the commencement of this action: but, whether or not, upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found, the defendant did promise as within specified, the jurors aforesaid were altogether ignorant; and thereupon, &c. And if upon the whole matter aforesaid it should seem to the court that the defendant did promise as aforesaid, then the jurors &c. said that the defendant did promise in manner and form as the plaintiff had within complained against him; and in that case they assessed the damages of the plaintiff on the occa-

sion of the not performing the promise within mentioned over and above his costs and charges by him about his suit in this behalf expended to 18*l.* 5*s.* 9*d.*, and for those costs and charges to 40*s.* But, if upon the whole matter aforesaid it should seem to the court that the defendant did not promise as aforesaid, then the jurors &c. said that the defendant did not promise in manner and form as the plaintiff had within in pleading alleged. And because &c.

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Wilde, Serjeant, for the plaintiff.—On the face of this special verdict it appears that the defendant has received money belonging to the plaintiff: if the plaintiff recovers in this action, the defendant will be liable to no other person in respect of the money so recovered. [*Tindal*, C. J. —The contention on the part of the defendant will be, that he was placed by the act of the plaintiff himself in the position that made it his duty to receive the money.] It cannot be said that the plaintiff acquiesced in the commission. It is found by the special verdict that the plaintiff was never a bankrupt; consequently the defendant never was assignee in point of law. The court cannot give judgment contrary to these facts: for, if a special verdict sets out the truth of the case, and also sets out matter of estoppel, the latter can never be allowed to prevail against the truth so appearing. It is manifestly too late to say that the plaintiff is estopped from disputing the commission, when it is found that there was no commission. Suppose the plaintiff did acquiesce; the whole of his acquiescence must be taken together: he was from the first disputing the commission; his application for the appointment of an assignee was with this view. In *Rex v. Osborne*, 9 East, 378, it was held, that, where money in litigation between two parties has by mutual consent been paid over to a trustee, in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was

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indebted; though he agreed to waive all objections to form. *Heane v. Rogers*, 9 B. & C. 577, 4 M. & R. 406, is an authority strongly in favour of the plaintiff's right to maintain this action. There it was held that a bankrupt who assists in the sale of his own goods under the commission, for the purpose of protecting his property, and seeing that it is sold to the best advantage, is not thereby estopped from disputing the validity of the commission: neither is he so estopped by giving notice to his lessors of a farm that he is a bankrupt and is willing to deliver up the lease, which they accept, his assignees not being parties or privies to the transaction. *Watson v. Wace*, 7 D. & R. 683, 5 B. & C. 153—where it is held that a person against whom a commission of bankrupt has issued, and who has obtained his discharge out of custody in an action pending against him, *on the ground of his bankruptcy*, cannot afterwards dispute the validity of the commission in a court of law—was cited in argument, and distinguished by Bayley, B., in delivering the judgment of the court—"because there *Wace*, one of the defendants, was the person from whose suit the plaintiff had been discharged; and therefore he might, perhaps, be estopped as against that person, by his own conduct towards him." *Heane v. Rogers*, it is to be observed, was an action of tort. In *Like v. Howe*, 6 Esp. 20, the bankrupt solicited divers creditors to vote for particular persons as his assignees, and was therefore properly held not entitled to dispute the title of those persons as assignees. Will the circumstance of the plaintiff in this case having applied to the commissioner for the appointment of an official assignee, for the purpose of investigating the petitioning creditor's debt, and of taking care of the property of the estate (the defendant not claiming to be a party to that communication), estop the plaintiff from disputing the validity of the commission as against the defendant? Clearly not. If the plaintiff had allowed the defendant to

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distribute the money received by him amongst his creditors, or if the defendant had paid it into the Bank of England, the plaintiff might then, perhaps, have been held to be estopped. [*Tindal*, C. J.—Should there not have been some previous demand of the money, before the plaintiff could sue as for money had and received? In the case of a stakeholder, the successful party cannot recover the money in this form of action until he has given notice to the party holding it that the wager has been determined in his favour.] If the defendant would under any circumstances be entitled to a demand, he has waived it in this case by claiming a right to retain the money against the bankrupt: he is litigating the plaintiff's right upon totally different grounds. As well might a tenant who disputes the title of his landlord insist upon his right to a notice to quit.

Atcherley, Serjeant, for the defendant.—The simple question here is, whether the plaintiff, who was himself the means of putting the defendant in such a situation as to render it his duty to receive this money, can now, without notice, turn round and say that it is money had and received to his use. It is not a question of estoppel in the technical sense of the word. But, the plaintiff having, by his own voluntary act, caused an official existence to be given to the defendant, he is estopped from disputing the propriety of acts which his character of assignee obliged the defendant to do. There is nothing on the face of the special verdict to shew any qualification of the defendant's power or duty: he was appointed in the usual manner; it was his duty to collect and receive the proceeds of the estate. The Lord Chief Justice, in delivering the opinion of this court upon the former occasion, says: "As to the second question above raised, the facts attending the application to the commissioner relative to the appointment of the defendant as official assignee, are

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not stated with any degree of precision or accuracy. We can only say, therefore, in general terms, that, if the defendant should turn out to have been appointed to the office through the means, instrumentality, or procurement of the plaintiff, it will be very difficult to say that he can have any right to maintain this action. It was the duty of the defendant when appointed to receive the money in question; he had no option, under the statute; and this was well known to the plaintiff at the time of his appointment. Whatever may have been the object or motive of the plaintiff, whether to enable himself to dispute the commission, or for any other purpose, can make no difference in the duty imposed by the statute on the defendant. The moment he was appointed, that duty attached upon him: and we think it at least very doubtful whether the bankrupt who assisted in or procured the appointment of the defendant to an office of which the duty was to receive the rents of his estate for the use of the creditors, can afterwards turn round upon him and charge him with having received those rents to the use of himself, the bankrupt. The case referred to of *Like v. Howe* appears a strong authority to that point." In that case it was held, that, if a trader against whom a commission of bankrupt has issued has acquiesced in it so far as to go to the different creditors, to solicit them to vote for particular persons as assignees, he cannot afterwards question the commission in an action for money had and received against those persons, whether he is an object of the bankrupt laws or not. [*Tindal*, C. J.—Here, the special verdict does not find that the plaintiff ever had any communication with the defendant, or caused *him* to be appointed, or that he even knew him.] But for the plaintiff's application to the commissioner, the defendant would never have been appointed. In *Clarke v. Clarke*, 6 Esp. 61, Heath, J., ruled, that, if a person against whom a commission of bankrupt issues, acquiesces in it so far as to take a part in the sale of his own effects under the commission, he shall not afterwards

be allowed to question it. Here, the application for the appointment of an assignee is clearly an acquiescence in the commission. *Clarke v. Clarke* is recognized by Bayley, J., in *Heane v. Rogers*. The same learned judge, in *Watson v. Wace*, 7 D. & R. 637, says: "A man cannot be permitted first to treat a commission of bankrupt issued against him as valid, and by so doing work a benefit to himself and an injury to others, and then to maintain an action at law for the purpose of declaring the commission void. It seems to me highly important that it should be understood that the law will not allow an action to be maintained under such circumstances; if it would, a door would be opened for committing frauds upon creditors, which would be equally injurious to the commercial world, and disgraceful to the administration of justice." *Ex parte Leigh*, 2 Glyn & J. 332, is an authority to shew, that, where the bankrupt acquiesces, the Chancellor will, upon petition, restrain him from proceeding at law. In *Flower v. Herbert*, 2 Ves. sen. 325, Lord Hardwicke says: "I will not encourage bankrupts to proceed in an action, if reason appears to stop them, or the matter to be further considered in this court; for, if a commission is taken out under the act of parliament, the bankrupt himself submitting to the whole proceeding, and the application to this court by the bankrupt, whether in the name of himself or another, and at a distance of time, an action is brought by the bankrupt himself against the assignees, I do not know who will accept to be assignee under a commission of bankruptcy: which makes it a matter of great consequence, if it should be open still to him to bring an action notwithstanding his acquiescence. It is true, the acts of parliament being very perilous to bankrupts, it is reasonable for a man who may believe he is no bankrupt to go before the commissioners, submitting to them for the time, yet still protesting that he is no bankrupt, he may notwithstanding bring an action in proper time: though

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this is pretty strong to do after surrendering, submitting to be examined by the commissioners, and going through all that process: yet that, I agree, would not bind him, but he might bring an action. But in this case he does not think fit to bring this action then, but in a year and a half after. He himself petitioned in the name of another creditor for new assignees, which is the same as if in his own name, amounting to a strong admission that the proceedings under the commission were right; there cannot be a stronger: yet now is this action of trover brought by him against the assignees a year and a half after, and may be as well done by him several years after if not within the statute of limitations: and then in what a condition are the assignees?" From these authorities, it is clear, that, where a party against whom a commission or fiat issues, once acquiesces in it, he cannot afterwards be permitted to dispute its validity, or to disaffirm any acts done under it; and that, if he himself calls an assignee into existence, he cannot afterwards turn round and make him responsible for acts done in that character which he himself has superinduced. It would also have been but common justice to have given this defendant notice of the special purpose for which the plaintiff procured him to be appointed assignee. And, at all events, if the present action be maintainable at all, there should have been a previous demand of the money. [*Gaselee, J.*—If the assignee had done his duty, and paid the money into the Bank, the Lord Chancellor would probably have restrained the plaintiff from proceeding at law.]

Wilde, Serjeant, in reply.—The rule of law that has been established and recognised by several of the cases cited, viz. that, after acquiescence in the commission, a party cannot dispute it, need not be questioned: whether there has been acquiescence or not, must depend upon the circumstances of each particular case. Here the special

verdict shews that the plaintiff was throughout repudiating and contesting the bankruptcy. His application to the commissioner was made solely with a view to the investigation of the petitioning creditor's debt, and the security of his property. The defendant was not appointed assignee through the procurement of the plaintiff: he was appointed in the usual manner. The question of acquiescence was not left to the jury: they have not found it; and the court cannot draw any inference which the jury have not drawn from the facts proved before them.—The whole course of the defence constitutes a waiver of demand.

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TINDAL, C. J.—This cause was sent down to a second trial in order to ascertain with more precision the circumstances attending the appointment of the plaintiff as official assignee, a doubt having on the former occasion been entertained as to whether the plaintiff had not taken an active part in procuring the defendant to be appointed to the office. Had it turned out on the second inquiry that the plaintiff had procured the defendant to be appointed, the case would have borne a strong resemblance to that of *Like v. Howe*, where it was held, that, if a trader against whom a commission of bankrupt has issued, has acquiesced in it so far as to go to the different creditors to solicit them to vote for particular persons as assignees, he cannot afterwards question the commission in an action for money had and received against those persons, whether he is an object of the bankrupt laws or not. It appears to me, however, that the circumstances of this case do not bring it within the principles established by *Like v. Howe* or any of the other cases cited. So far from the plaintiff's having done any act capable of being construed as a procurement of the appointment of the defendant, it appears that all he did was to apply to the commissioner and request him to appoint an official assignee as well for the purpose of protecting the property as of investigating the

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petitioning creditor's debt. It does not appear to have been communicated to the defendant that he was appointed for any specific purpose; but he was appointed in the ordinary course: and when he entered upon the duties of his office, he was called upon to exercise those duties in the usual manner. It has been contended, that, if the defendant's appointment was not the result of the plaintiff's procurement, still it sufficiently appears from the special verdict that the plaintiff acquiesced in it, to prevent him from questioning the propriety of acts done by him in the character of assignee. But, on a special verdict, we are not at liberty to make any inference. And, if we were at liberty to infer anything, I should feel considerable difficulty in coming to the conclusion that the plaintiff had ever acquiesced in the commission. The special verdict states, "that, after the issuing of the commission, the plaintiff disputed the validity of the commission on the ground of the alleged insufficiency of the petitioning creditor's debt." After such a finding it seems to me to be impossible to infer any acquiescence on his part. The finding of the jury that there was in fact no petitioning creditor's debt, affords a distinct answer to such an inference. In such a case the doctrine of estoppel does not apply. In Co. Litt. 352. b. it is laid down, that, "where the verity is apparent in the same record, there the adverse party shall not be estopped to take advantage of the truth; for, he cannot be estopped to allege the truth when the truth appeareth of record." And in *Ludford v. Barber*, 1 T. R. 86, where a lease executed by a tenant for life, in which the reversioner, who was then under age, was named, but not executed by him, was held to be void on the death of the tenant for life, and an execution by the reversioner only afterwards to be no confirmation of it so as to bind the lessee in an action of covenant—Buller, J., said: "The court cannot go on the doctrine of estoppel in this case, because it is admitted by the plaintiff's own

showing on these pleadings that the plaintiff did not execute till two years after the death of the tenant for life." The question then is, whether a demand was necessary in this case to entitle the plaintiff to maintain this action. Clark, the defendant, is to be considered as an ordinary assignee: and the question is whether the action would not be maintainable against an ordinary assignee—whether the money received by this defendant is not *ex vi legis* the money of the bankrupt. It is by no means an uncommon thing to try the validity of a commission by an action of trespass: and who ever heard of such an action being held not maintainable for want of a previous demand where there is no valid and existing commission? Why, therefore, may not the tort be waived, and an action for money had and received brought for the proceeds of the estate in the hands of the assignee? It appearing by the special verdict that the money in question was received by the defendant, and that there was no valid commission, the amount so received becomes the money of the plaintiff, and consequently the action maintainable, without any demand. I am therefore of opinion that the plaintiff is entitled to judgment.

GASELEE, J.—I am of the same opinion. There is this obvious distinction between *Like v. Howe* and the present case—there the bankrupt went about to different creditors to solicit them to vote for particular persons as assignees: whereas, here, all that the plaintiff did was to call upon the commissioner to appoint some person as official assignee in order that his property might be taken care of and the petitioning creditor's debt investigated. This was no more than surrendering to the commission; and it has been held that a trader who has been declared a bankrupt does not preclude himself from trying the validity of the commission in an action against the assignees, by having surrendered under the commission, or by having presented

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a petition to the Chancellor to enlarge the time for his surrender—*Mercer v. Wise*, 2 Esp. 219. The object of a surrender is, to avoid the highly penal consequences awaiting a neglect to surrender (a). In *Watson v. Wace*, the bankrupt had precluded himself from disputing the validity of the commission, by having obtained his discharge from custody on the ground that his detaining creditors had proved under the commission. So, in *Goldie v. Gunston*, 4 Camp. 381, the bankrupt having obtained his discharge out of custody in an action (by a judge's order) on the ground of his bankruptcy, it was held that he was precluded from afterwards contesting the validity of the commission in a court of law. In the present case, there is nothing to indicate an acquiescence by the plaintiff in the commission against him: on the contrary, it appears that he uniformly disputed its validity. It is clear that the court are not bound by an estoppel where the matter appears upon the record. As to the alleged necessity for a demand—many actions are brought against assignees for the purpose of disputing the validity of commissions without any previous demand being thought requisite. I also think that the fact of the defendant setting up an adverse title is a decisive argument on this point: it was in effect a waiver of a demand. The demand, if made, clearly never would have been complied with. There is no hardship in the case. The assignee is undoubtedly to be protected, as Lord Hardwicke says: but that is only where he has done his duty. The defendant

(a) Bayley, J., in delivering the judgment of the court, in *Heane v. Rogers*, says (4 M. & R. 496): "We are of opinion that the bankrupt was not in point of law estopped by his notice and proposal of surrender; and, indeed, it appears to us that it would be a very great hardship upon him if he

were so estopped. It is quite clear that his merely surrendering under the commission is no estoppel—*Mercer v. Wise*, 3 Esp. 219; and upon the soundest principles, for, it would be a perilous thing indeed for a bankrupt to dispute a commission and try its validity by such means."

might have applied to the Chancellor for protection against the consequences of this action, if he could have gone with clean hands. But he has failed in his duty, in having omitted to pay the money received by him into the Bank.

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BOSANQUET, J.—I am of opinion that the plaintiff is entitled to judgment. Two points have been discussed before us upon the present occasion—the one, whether an official assignee is subject to the same measure of liability as the assignees appointed by the creditors are—the other, whether under the special circumstances of this case the action is maintainable. The first point was determined on the former occasion—see *Munk v. Clarke*, 3 M. & Scott, 463, 10 Bing. 106. With respect to the second point, it is contended that the plaintiff has acquiesced in the commission, and procured or acquiesced in the appointment of the defendant as official assignee. It seems to me that the circumstances that are relied on as leading to an inference of acquiescence must be laid out of the question; for, the special verdict finds expressly that the plaintiff was not subject to the bankrupt laws. Independently of that, the facts are not such as to warrant the inference of an acquiescence. The special verdict finds, that, at the time of issuing the commission, the plaintiff was not indebted to Foster [the petitioning creditor] in the sum of 100*l.*; that, after the issuing of the commission, the plaintiff disputed the validity of the commission on the ground of the alleged insufficiency of the petitioning creditor's debt; that, on the 23rd January, 1831, the plaintiff applied to one of the commissioners of the court of bankruptcy to appoint an official assignee to the said commission, as well for the purpose of investigating the said petitioning creditor's debt as for the purpose of taking care of the property of the estate; and that the said commissioner, on the application of the plaintiff for the appointment of such official assignee, appointed the defendant an official trustee of the

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estate and effects of the plaintiff under the commission for the purposes aforesaid." If these facts had been in evidence before a jury, they would not warrant them in finding that the plaintiff in any manner acquiesced in the commission: nor do I think he can be held so to have procured the appointment of the defendant as official assignee to receive the money in question, as to estop him from maintaining the present action for its recovery. The case is in this respect clearly distinguishable from *Like v. Howe*, where the plaintiff actually canvassed for votes in order to secure the appointment of the defendant as assignee. Here the defendant was appointed in the usual course by the commissioner: he took the office clothed with its ordinary authorities and subject to its ordinary liabilities—subject to be sued for the monies coming to his hands if the party against whom the commission issued should turn out not to have been bankrupt. It is not found by the special verdict that the defendant was served with any demand or notice to pay over the money to the plaintiff before action brought. But, if the defendant stands in the same situation as an ordinary assignee, such notice or demand was not requisite. The plaintiff not being a bankrupt, the money still remains his money. If we were at liberty to draw any inference from the special verdict, I think it would be impossible to avoid seeing that the defendant has set up a title to the money adverse to the plaintiff, and thus rendered a previous demand unnecessary. Without, however, the aid of inference, my opinion is that no demand was necessary, and that the plaintiff is entitled to recover, first, because there is no difference in point of liability between an official and another assignee, and secondly, because the circumstances of this case are not such as ought to be held to limit the defendant's liability.

Judgment for the plaintiff.

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MOON & Another, Assignees of J. H. FISHER, a Bankrupt, v. RAPHAEL and Another.

THIS was an action of trover, brought by the plaintiffs as assignees of James Hurtle Fisher, a bankrupt, to recover certain goods that had been seized by the defendants, as sheriff of Middlesex, under a writ of *fi. fa.* The defendants pleaded—first, not guilty—secondly, that the plaintiffs were not possessed of or entitled to the goods and chattels in the declaration mentioned as of their own property, as such assignees as aforesaid, in manner and form &c.—thirdly, that the said James Hurtle Fisher did not become bankrupt according to the form and effect of the statute in force concerning bankrupts, in manner and form &c.

The cause was tried before Gaselee, J., at the Sittings at Westminster after the last term. The facts that appeared in evidence were as follow:—On the 21st November, 1834, a writ of *fi. fa.* against the goods of Fisher, at the suit of one Ridgway, for 300*l.* debt, and 65*s.* damages, and indorsed to levy 151*l.* 10*s.*, was lodged at the sheriff's office. On the following day, the sheriff's officer went to Fisher's house, but, expecting that the action would be settled, he did not leave a man in possession, merely sending occasionally to see that the property remained there. The action not being settled, the officer resumed possession on the 21st January, 1834. On the 21st January, another person came upon the premises and took possession under a mortgage alleged to have been made by Fisher on the 4th September, 1834, for a debt of 290*l.*;

In trover by assignees of a bankrupt against the sheriff for seizing under a *fi. fa.* goods of the bankrupt after an act of bankruptcy committed, it appeared, that, in consequence of the sheriff's possession, the goods became liable to the landlord for a quarter's rent of the bankrupt's premises, and charges were incurred for a messenger that otherwise would not have been necessary; and that the goods had, after the commencement of the action, been delivered up to, and unconditionally accepted by, the plaintiffs in a perfectly deteriorated condition:—Held, that the plaintiffs were not entitled to recover the rent and charges so incurred, by way of special damage; there being no aver-

ment of special damage in the declaration.

Quære, whether such rent and charges were so necessary a consequence of the wrongful conversion as to entitle the plaintiff to recover them in trover, even with an averment of special damage.

A plea of denial of bankruptcy (under the new rules) does not dispense with the necessity of the notice to dispute required by the 6 Geo. 4, c. 16, s. 90.

In trover against the sheriff, the officer who seized, being called to prove the warrant, stated that he entered on a certain day under a warrant in the usual form, but that he had lost the warrant:—Held, sufficient to fix the sheriff.

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and on the 23rd the landlord distrained for rent, and left his man in possession. On the same day, viz. the 23rd January, a docket was struck against Fisher, and the messenger took possession of all his effects, and notice was given to the sheriff's officer to withdraw, notwithstanding which he retained possession until the 2nd of May. When the sheriff withdrew, both the mortgagee and the messenger were still in possession. The sheriff had no notice of an act of bankruptcy having been committed by Fisher before he made the levy. To prove their title to the goods as assignees, the plaintiffs offered in evidence the proceedings under the fiat against Fisher; whereupon it was objected, on the part of the defendants, that, inasmuch as the bankruptcy of Fisher was put in issue by the third plea, the proceedings were not evidence, but the plaintiffs must prove the trading, petitioning-creditor's debt, and act of bankruptcy, in the usual way. For the plaintiffs, it was contended that the 90th section of the 6 Geo. 4, c. 16 (a), makes the proceedings evidence, unless notice be given of the defendant's intention to dispute the trading, the petitioning-creditor's debt, or the act of bankruptcy—*Trimley v. Unwin* (or *Uwins*), 6 B. & C. 537, 9 D. & R. 548; and a plea simply denying the bankruptcy clearly cannot be held to be equivalent to a notice under the statute: the plea must, at all events, be as explicit as the notice was required to be. The proceedings were read. The act of bankruptcy was on the 17th July, 1834.

(a) Which enacts, "That, in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the

trading or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters," &c.

Levy, the sheriff's officer, was called to prove the warrant. He stated that he had a warrant from the sheriff in the usual form, but had lost it; that he did not fetch it himself from the sheriff's office; one of his men must have done so. It was objected that this was not sufficient evidence to connect the sheriff with the transaction. The learned judge, however, thought otherwise; but he reserved the point (b).

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The property was delivered up to and received by the assignees after the delivery of the declaration; and it was admitted that it had not been at all deteriorated in value during the time of the sheriff's possession: but the plaintiffs claimed as damages (though no special damage was alleged in the declaration) a sum of 45*l.*, which had been incurred for rent of the premises, and a further sum of 15*l.* for the expenses of the messenger's possession, within that period. The learned judge told the jury that there was sufficient evidence of a conversion on the 23rd January, 1835, when notice of the fiat was given, and a demand of the goods made; and that the goods having been restored undiminished in value, the plaintiffs were only entitled to nominal damages for that conversion: but, with a view to prevent the parties going down again, he directed them to ascertain what the plaintiffs were entitled to as damages for the detention of the property from the 23rd January to the 2nd May. The jury accordingly returned a verdict for the plaintiffs—damages 60*l.*, with liberty to the defendants to move to reduce them to one shilling, should the court be of opinion that special damage was not recoverable.

Alexander, on a former day, moved for a nonsuit or new trial, or a reduction of damages.—Independently of the

(b) The court afterwards, on to let in parol evidence of the contents of the warrant.
 motion, held this to be sufficient

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proceedings under the commission, there was no evidence of an act of bankruptcy having been committed by Fisher. Before the new rules in pleading, it was not necessary to put upon the record a special plea denying the bankruptcy, that being put in issue by the general issue, provided the notice required by the 6 Geo. 4, c. 16, s. 90, had been duly given. But now that such a defence is required to be specially pleaded, the notice can no longer be necessary. If it had been intended to object to the sufficiency of the plea in point of form, the plaintiffs should have demurred to it.—There was no evidence of a conversion. The officer could not restore the possession to the plaintiffs: the property was in *custodiâ legis*.—Then, as to the damages. The action is brought to recover the value of the goods only: no special damage is alleged, even if special damage can be alleged in this form of action. The sums paid for rent and for the messenger's charges clearly form no part of the value of the goods. Had the goods been deteriorated by the detention, the question whether special damage could have been recovered in respect of such deterioration, might legitimately have arisen.

TINDAL, C. J.—I think the proceedings under the bankruptcy were properly admitted at the trial. On the part of the defendants, it is contended that the third plea, which puts in issue the bankruptcy, was sufficient to dispense with the notice to dispute required by the 90th section of the 6 Geo. 4, c. 16, the absence of which absolves the party suing or sued for anything done under the commission or fiat from the necessity of proving the several steps requisite to the support of the commission. The question is whether the law in this respect is altered by the late rules, one of which requires a denial of bankruptcy to be specially pleaded. It appears to me that under such a plea the mode of proving the bankruptcy rests precisely where it did; and that the law by which that proof is re-

gulated is unrepealed by the statute which gave power to the judges to frame rules for regulating the mode of pleading in the different courts of law. The section in question provides "that, in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for anything done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters." No notice having been given pursuant to this section, it follows that the production of the proceedings under the commission was sufficient to establish the bankruptcy of Fisher.—The question of damages, however, is one deserving of consideration; as to that, therefore, the rule may go.

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PARK, J.—It is perfectly clear that the new rules of pleading were not intended to alter the medium of proof ascertained by the 6 Geo. 4, c. 16, s. 90. No notice having been given, no proof as to the validity of the fiat was necessary to render the proceedings under it admissible.

GASELEE, J.—The rules in pleading, which were confessedly made for the express purpose of shortening proof, and saving expense to suitors, would but ill attain that object did they render necessary more proof than was before required. I think the proceedings were properly received.

BOSANQUET, J.—I concur with the rest of the court in thinking that the third plea, which simply alleges that

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Fisher "did not become bankrupt," did not dispense with the notice required by the act, specifying the particular points which it was intended to dispute.

A rule nisi having accordingly been granted to reduce the damages to one shilling—

Talfourd, Serjeant, and *E. V. Williams*, shewed cause.—The rent and messenger's charges having been incurred in consequence of the wrongful act of the defendants, the plaintiffs ought in justice to be recouped: and the former not having been paid until after the action was brought, it could not be inserted in the declaration. It is indisputably clear that the delivery up of the thing converted, whether before or after action brought, does not preclude the owner from maintaining an action of trover: but in such case it is for the jury to say to what extent such restoration shall go in mitigation of the damages. In *The Countess de Rutland's case*, 1 Roll. Abr. 5 L., pl. 1, it is said: "Si home prist mon chival et ceo chevaucha, et puis ceo redeliver al moy, uncore jeo poie aver cest action vers luy; car ceo est un convercion, et le redelivery nest ascun barr del action, mes solement serra un mitigacion de damages." In *Syeds v. Hay*, 4. T. R. 264, the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf: in trover at the suit of the owner of the goods against the captain, it was held that the plaintiff was entitled to recover as damages the charges paid for wharfage: and Buller, J. said: "If a person take my horse to ride, and leave him at an inn, that is a conversion; for, though I may have the

horse on sending for him and paying for the keeping of him, yet it brings a charge on me." In *Fisher v. Prince*, 3 Burr. 1364, Lord Mansfield says: "In trover for money numbered, or in a bag, the court have ordered it to be brought in; yet the jury may give more damages; they may allow interest, and in many cases they ought." In *Gibson v. Humphrey*, 1 Cr. & M. 544, 2 Tyr. 588, Bayley, B., says: "The cases have only gone to the extent that the court will stay proceedings on payment of costs, where the defendant restores the chattel alleged to be converted, *and the plaintiff claims no special damage*, and where, if the chattel was sold, and no dispute as to the sum to be recovered, the court might interfere: but they cannot interfere if the plaintiffs do not agree as to the amount." And in *Greening v. Wilkinson*, 1 C. & P. 625, it was ruled by Abbott, C. J., that, in trover, the jury are not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time, in their discretion. In the present case, if the sheriff had not kept possession, the plaintiffs would have removed the goods before the landlord's right of distress accrued, and then the rent for the current quarter would only have been a debt proveable under the commission: and if the plaintiffs had refused to receive the goods when offered, and the defendants had applied to the court to stay the proceedings, in the usual way, on delivery up of the goods and payment of costs, the application would only have been granted upon such terms as would have secured the plaintiffs from all loss in consequence of the detention. In *Tucker v. Wright*, 3 Bing. 601, 11 Moore, 500, Best, C. J., says: "Where complete justice can be done by the delivery of a specific chattel, the court will sometimes interfere to stay proceedings; but there is no instance in which the court has interfered with the intention of referring it to the officer of the court to

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ascertain a disputed value, and to place himself in the situation of a jury." (c)

Alexander and Butt.—Whether or not the plaintiff, in an action of trover, can, under any circumstances, recover anything in the shape of special damages, is not now the question; for, this declaration contains no averment of special damage. In *Sippora v. Bassett*, 1 Sid. 225, where, in an action of trover for goods, the plaintiff sought to recover money paid by him in order to get possession of the goods, the declaration contained a special averment; and there, as in *The Countess of Rutland's* case and *Syeds v. Hay*, the special damage was a natural and necessary consequence of the wrongful conversion. But, here, the payment of rent and messenger's charges can hardly be said to be the *consequence* of the defendants' act: it does not follow that the assignees would have given up possession of the premises had the goods not remained in the sheriff's possession; the quarter had been entered upon before the seizure, and the demand was not made until the 20th February; either the bankrupt or the assignees, therefore, would be clearly liable for the rent till Lady-Day. The action of trover is properly an action for damages, and the proper and only measure of damages (for goods) is, the value of the goods, either at the time of the conversion or at a subsequent period, in the discretion of the jury: they cannot go beyond such value, and give damages for that which is totally unconnected with and not the necessary result of the conversion. The cases collected in Comyn's Digest, *Action upon the Case upon Trover*, (G 2.), (G 3.), shew the extreme nicety which formerly was required in

(c) If the value of the thing be uncertain, or the plaintiff insists upon going for *special damages*, the court will not stay the proceedings on delivery of the thing sued for, and costs. *Whitten v. Fuller*, 2 W. Blac. 902.

the description of the thing alleged to have been converted, in order to protect the defendant against a second action for the same cause, or against excessive damages. In Viner's Abridgment, *Evidence* [T. b. 6], it is said, that, "where a matter arises *ex turpa causa*, viz. an injury per defendant to the daughter of the plaintiff, under colour that he would marry her, &c.; the act may be given in evidence upon such a declaration [trespass quare clausum et domum fregit, et alia enormia ei intulit] under the alia enormia, because the law will not compel the party to shew it of record: but, in all other cases of trespass, the special matter for which damages shall be given ought to be pleaded, as in trespass for taking a horse, &c., nothing shall be given in evidence but what is expressed in the declaration." In an action of slander or for a libel, the plaintiff cannot recover by way of special damage a compensation for the loss of customers, unless it be made the subject of a special averment. Here, the declaration contains no demand for house-rent or messenger's charges: possibly the plaintiff might have succeeded on a count in case. Under the circumstances, the goods having been restored and accepted in an undeteriorated condition, the plaintiffs can only be entitled to nominal damages.

TINDAL, C. J.—I think the rule obtained in this case for reducing the damages to one shilling must be made absolute. The action was trover to recover damages for the conversion of property belonging to the bankrupt, which was delivered up by the defendants to the assignees after the commencement of the action but before the trial, and accepted by the assignees. If the defendants had applied to the court to stay the proceedings on the delivery up of the goods sought to be recovered by this action, the court would not have compelled the assignees to accept them unless it were made to appear that they would sustain no injury by so doing. The plaintiffs, how-

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ever, thought proper to accept the goods and go on to trial. The practice of the last century has been, for the jury to give nominal damages, taking into consideration the redelivery of the goods, though such redelivery took place after the issuing of the writ. At the trial the plaintiffs claimed to recover special damage. The declaration, however, is in the ordinary form of a declaration in trover, without any allegation of special damage. Besides, the special damage set up was more than one degree removed from the natural result of the wrongful act of the defendants: the plaintiffs sought to recover the amount paid for rent of the premises on which the goods were detained during the period of their detention by the defendants. This clearly was not a damage necessarily incidental to the wrongful taking of the property. If the action had been trespass, it is possible that the special allegation of damage might have been sustained: but we are not now called upon to decide whether or not special damage may be alleged in trover. Cases have been cited to shew that damages may be recovered in trover where the thing sought to be recovered has been redelivered before the commencement of the action. One observation, however, disposes of all these cases: the damage that was allowed to be recovered was the necessary result of the tortious act of taking. Thus, in the *Countess of Rutland's* case, the conversion of the horse might have been a serious damage to the plaintiff: much would depend in such a case upon the length of the ride, the mode of riding, and the weight of the rider. So, in the case put by Buller, J., in *Syeds v. Hay*, the party it is true would get back his horse on paying for his keep; but that charge would be the necessary and immediate consequence of the wrongful conversion of the plaintiff's property. The decision of the court in *Gibson v. Humphrey* does not seem much to bear on the point: it merely decides that the court will not stay the proceedings in an action of trover, on payment of

costs, except in cases where the defendant has restored the chattel alleged to be converted, and where the plaintiff claims no special damage, or where, in case the thing has been sold, there is no dispute as to price. In the present case, the damage not being necessarily consequent upon the wrongful act of the defendants, if recoverable at all, it can only be so on a count framed to include it.

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PARK, J.—I am of the same opinion. In *Tucker v. Wright*, the amount of the damage not being ascertained, the court declined to interfere. It is unnecessary on the present occasion to decide whether or not special damage might have been recovered in this action had the declaration been framed so as to embrace it.

GASELEE, J.—At the trial I entertained considerable doubts as to the propriety of receiving evidence of special damage: but I ultimately admitted it in order to save the parties the expense of going down again if the court should think it admissible. It occurred to me, however, that special damage could not be alleged in trover: at present we are not called upon to decide that point; for, it is perfectly clear, that no special damage being alleged, evidence of special damage was not admissible. If, instead of accepting the goods as they did, the plaintiffs had put the defendants to the other alternative, of applying to the court to stay the proceedings, the court would in all probability have made it a condition of their interference that the defendants should make good the damage the plaintiffs had sustained by reason of the improper detention of the goods.

Rule absolute (a).

(a) See *Evans v. Lewis*, 3 D. P. C. 819.

In *Tidd's Practice*, 9th edit., p. 885, it is said—"In trover

for title deeds of an estate belonging to the plaintiff, and of great value to him, although of little or no value to the defendant,

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Wednesday,
Nov. 25th.

OSBORNE v. ANGLE.

By a rule of court of Hilary Term, 3 Geo. 2, the warden of the Fleet Prison is directed to provide a confined room or dungeon for the confinement of persons endeavouring to make their escape, or guilty of any other misdemeanor—"that the general quietness and liberty of the rest of their fellow prisoners may not be restrained or suffer thereby." A warrant from the Lord Mayor for the apprehension on a charge of forgery of a prisoner in execution in the Fleet being lodged at the door of the prison, the warden caused the party to be placed in the strong room:—Held, that this was no excess of authority.

THE defendant on the 6th November rendered in discharge of his bail in this action, and remained in the custody of the Warden of the Fleet Prison. On the 17th, the defendant having been charged before the Lord Mayor with feloniously disposing of and putting away a forged bill of exchange for 80*l.*, with intent to defraud Sir William Curtis, a warrant against him was lodged at the gate of the Fleet; whereupon the Warden caused him to be conveyed to the strong room.

F. Kelly, on a former day—upon an affidavit which stated that the warrant was obtained upon an *ex parte* statement, in the absence of the defendant; that no steps had been taken to cause him to be examined upon the charge, which was unfounded, and which he was ready to meet; that he had never meditated or attempted to escape; that the room in which he was confined was apart from the rest of the prison, and was a species of dungeon, small, damp, noxious, and unwholesome; and that an offer had been made to remove the restraint under which he was placed, provided he would find security for the debts for which he was detained—obtained a rule, calling upon the warden to shew cause why the defendant should not be restored to the proper and ordinary custody of the prison.

if it should appear that the latter is in possession of them and will not deliver them up, the jury would probably be directed to give liberal damages. On the other hand, if trover be brought by the assignees of a bankrupt against the sheriff, to try the validity of a sale under an execution, and it appear that the defendant had a

probable cause for taking the goods, and that they were fairly sold, for as much as they would probably have produced if sold under the commission, he might only be deemed answerable for the produce of the sale."

And see Com. Dig. *Action upon the Case upon Trover*, (D).

Wilde, Serjeant, now shewed cause.—He produced an affidavit made by the warden which stated that he had without effect made application to the Lord Mayor, and also to the solicitors at whose instance the warrant had been issued, for advice as to what was to be done with the prisoner; that the room in which the prisoner was confined was dry, well ventilated, of a reasonable size, and as little disagreeable as a place of separate confinement and of complete security could be rendered in a prison like the Fleet, which has no accommodation for criminals (which statement was confirmed by the report of one of the secondaries, whose duty it is periodically to inspect the prison); that the warden was authorized by a rule of Hilary Term, 3 Geo. 2 (a), to provide such a room for securing persons who might attempt to escape, or had been guilty of misdemeanors; that he could not, with safety to the peace of the prison, or consistently with the convenience of the other prisoners, allow a person charged with a felony to associate with those who were only prisoners for debt; that, upon an average, upwards of three thousand persons passed in and out of the prison every day; and that such persons, as well as the prisoners for debt, must be subjected to new restraints if the applicant could not be confined apart.

The learned Serjeant submitted, that the warden was fully justified in placing in stricter confinement one charged with a felony, whose anxiety to escape would be greater than that of an ordinary prisoner for debt, and by whose society the other prisoners would naturally feel themselves contaminated and aggrieved; that the principle of the

(a) Section 7, which provides “that the warden shall, with all convenient speed, make and provide a confined room or dungeon in the wards, as it was before the great fire of London, for the confinement of persons endeavouring to make their escape, or guilty of any other misdemeanor, that the general quietness and liberty of the rest of their fellow prisoners may not be restrained or suffer thereby.”

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classification of prisoners in county gaols, enforced by the 4 Geo. 4, c. 64, s. 10 (b), applied with equal force to the Fleet Prison; and that the defendant might bring the charge against him to the test whenever he pleased, by applying for a habeas corpus, which the warden could not do.

Kelly and Humfrey, in support of the rule.—Under the rule of court referred to, the warden had no authority to remove the defendant into this particular and confined custody. The rule applies only to persons endeavouring to make their escape: this it is not suggested the defendant has done. He is not *guilty* of any felony or misdemeanor: a mere *ex parte* charge has been made against him, which charge he swears is wholly unfounded, and which he professes to be ready to meet. The copy of the warrant lodged at the Fleet was not addressed specially to the warden: it could give him no greater authority over the prisoner than he already possessed: at most, it authorized those who had a right to act upon it to take the defendant before the Lord Mayor for examination. [*Per Curiam*.—Taking the party before the Lord Mayor without a habeas corpus would be a voluntary escape.] The defendant was not bound to apply for a habeas corpus, at an expense perhaps beyond his means, in order to

(b) Rule 6; which provides, "that the prisoners of each sex shall be divided into distinct classes, care being taken that the prisoners of the following classes do not intermix with each other:—In gaols—first, debtors and persons confined for contempt of court on civil process—second, prisoners convicted of felony—third, persons convicted of misdemeanours—fourth, prisoners committed on charge or suspicion of

felony," &c. &c.; and that, "if the keeper shall at any time deem it improper or inexpedient for a prisoner to associate with the other prisoners of the class to which he or she may belong, it shall be lawful for him to confine such prisoner with any other class or description of prisoners, or in any other part of the prison, until he can receive the directions of a visiting justice thereon."

further a prosecution against himself. Suppose the prosecutor does not choose to proceed with the charge; is the defendant to remain in the strong room for ever? The very offer to let him out of his solitary confinement on his giving security for the debts for which he was detained, shews conclusively that the apprehension of the warden was that he should escape from the civil restraint, and not from the criminal charge. One who is confined for debts to a large amount has a greater inducement to escape than he would have if confined for a small debt: and yet the fact of a party being detained for a large debt gives the warden no power to put him in a place of punishment.

TINDAL, C. J.—I am not sorry that this question has been brought under the consideration of the court, because it is our duty, and it would afford us much satisfaction, to interpose if it were made to appear to us that a greater degree of severity and coercion had been exerted against a prisoner than the circumstances of the case called for. The question is, whether, with reference to the safe custody of this defendant and to the comfort and due regulation of the other persons confined in the Fleet, an improper and unnecessary restraint has been imposed upon the defendant. It appears to me that the course adopted by the warden on the present occasion was one in which the circumstances fully justified him. Great stress has been laid upon the rule of Hilary Term, 3 Geo. 2, which authorizes the erection of a strong room in the prison of the Fleet. The 7th section directs “that the warden shall, with all convenient speed, make and provide a confined room or dungeon in the wards, as it was before the great fire of London, for the confinement of persons endeavouring to make their escape, or guilty of any other misdemeanor;” and the reason given is, “*that the general quietness and liberty of the rest of their fellow prisoners may not be restrained or suffer thereby.*” The rule further goes on to declare “that a confined room was pro-

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vided according to the said last-mentioned order, and that the same was boarded, wholesome, and dry:" and we have it from our officer, whose duty it is to inspect the prison, that such is the condition of the room at this moment. One of the grounds to warrant the confinement of a debtor in the strong room is, an endeavour to make his escape: and the question is whether the warden is bound to wait until there has been an actual attempt on the part of the prisoner to escape, or whether he will not be warranted in the adoption of precautionary measures where circumstances have occurred which render such an attempt an extremely probable event. The defendant, it appears, is in confinement for several debts. A charge is subsequently preferred against him, which, if he be guilty, may render him liable to transportation for life: and a warrant for his apprehension upon that charge is lodged at the gate of the prison. Now, such a warrant is not to be treated as a mere piece of waste paper: it is granted only upon oath. Being charged with an offence of so serious a nature, it is impossible not to perceive that the defendant would stand in a very different situation with reference to a desire to escape from parties confined merely for debt. One of the reasons given by the rule for the separate confinement of a party endeavouring to escape, is, "that the general quietness and liberty of the rest of their fellow prisoners may not be restrained or suffer thereby." How could the warden, with a due regard to the security of the defendant and to the general quietness and liberty of the rest of his prisoners, allow a person over whose head a charge of so serious a nature as forgery was impending to go about without some additional restraint? Is the warden to have a person to watch him constantly? or is he to allow the same free and unrestrained ingress and egress to the three thousand persons who daily pass the gate of the prison, where one man has so much more probable a desire to effect his escape? A further ground is, that the rest of the prisoners would feel indignant if one

labouring under such a stigma were permitted to be upon the same footing with themselves. It appears to me, therefore, that the warden has done no more, in confining this defendant in the strong room, than the general quietness and liberty of the rest of the prisoners imperatively called upon him to do : and I do not think he has put the matter upon an improper footing, when, finding no disposition in the prosecutor to press the charge to a speedy hearing, he required security for that for which he would alone be liable. And I am the less inclined to interfere on the present occasion, inasmuch as it is in the power of the party himself to bring the matter to an issue. I think the rule must be discharged.

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PARK, J.—It is not suggested that any hardship has been imposed upon the defendant beyond the mere confinement in the strong room. The words of the rule, “guilty of any other misdemeanor,” do not apply to a conviction for a misdemeanor in the ordinary sense; but merely to a misdemeanor committed within the gaol. I think it would be most improper to permit a party against whom a charge of forgery has been made on oath to mix with the rest of the prisoners. Many respectable persons may from unforeseen and inevitable calamity become inmates of a debtors’ gaol: and it would be harsh and indecorous in the extreme to oblige them to consort with felons or persons suspected of felony. It appears to me that the warden was well justified in what he has done.

GASELKE, J.—I am of the same opinion. The warden is responsible for the safe custody of the prisoners committed to his charge; and he must use his own discretion as to the best mode of keeping them, subject always to the superintending power and control of this court. In the present case, I am of opinion that there has been no excess or unnecessary hardship or restraint imposed upon the

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defendant, regard being had to the nature of the charge against him, and to the probability of his desire to escape being greatly increased.

Rule discharged.

Monday,
 Nov. 23rd.

A distringas to compel appearance cannot issue after the expiration of the writ of summons.

LEMON v. LEMON.

F. V. Lee moved for a distringas to compel the appearance of the defendant in this case. It appeared from the affidavit that the writ of summons issued on the 29th January last, and consequently had expired on the 29th May, and had not been continued.

TINDAL, C. J.—By the 10th section of the 2 Will. 4, c. 39; it is enacted “that no writ issued by authority of that act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith.” There having been no actual service of the writ within the four months, it appears to me that an application to the court after the expiration of that period for a distringas to compel appearance to the writ which has come to its natural end, is too late. The writ of summons having been allowed to become extinct, it cannot be made the foundation of any subsequent proceeding. If the distringas could issue after the four months have elapsed, the writ of summons not having been continued as provided for by the act, I see no reason why it might not equally be sued out at any period, however remote.

The rest of the court concurring—

Rule refused.

EDGINGTON v. NIXON and LAMB.

THE defendants had formed part of a committee for conducting an entertainment given by a person named Nokes, at Greenhithe, in August, 1835. On that occasion Nokes personally ordered of the plaintiff certain marquees and tents, which were accordingly furnished. On the 29th July, the plaintiff delivered to Nixon, as the attorney for Nokes (who resided in the country), a bill of parcels headed, as sworn by Nixon, "William Nokes, Dr. to T. Edgington." On the 8th August, the plaintiff called at Nixon's office, and asked to be allowed to have back this bill, on pretence of wishing to add certain items that had been omitted by mistake. The bill being handed to him, he took it away, and shortly afterwards left with Nixon a second bill, making the present defendants his debtors in lieu of Nokes: and to enforce this demand the present action was brought.

Wilde, Serjeant, obtained a rule calling upon the plaintiff to shew cause why the proceedings should not be stayed until the plaintiff had restored the bill to Nixon.

Atcherley, Serjeant, shewed cause upon affidavits generally denying the imputed fraud, and stating that the paper in question had been headed "Nokes and others, Drs.," and that the defendant had since destroyed it.—The transaction out of which this motion arises took place long before the commencement of the action: the court therefore has no authority to make the order prayed. They will only interfere where the matter arises pending a suit, where the act complained of is in the nature of a contempt, or where the document the inspection or copy of which is required is held by the one party as a sort of trustee for the other. In *Threlfall v. Webster*, 7 Moore,

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The plaintiff delivered to the defendant as solicitor for one N., a bill for goods sold, making (as the defendant alleged) N. his debtor, and afterwards surreptitiously withdrew it and substituted another, making the defendant his debtor. In an action against the defendant for the amount, the court ordered the proceedings to be stayed until the plaintiff should have delivered a copy (the original having been destroyed) to the satisfaction of the prothonotary.

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559, 1 Bing. 161, the court refused, in the exercise of its discretionary power, to compel a defendant to produce certain bills of exchange on which the action was brought, and which were set out in the plaintiff's declaration, in order that he might inspect or take copies of them, on an affidavit by the plaintiff, stating that the defendant had obtained them from him by undue and fraudulent means, which the defendant negatived in general terms. At all events, the defendants can have no property in a bill delivered to Nixon as the attorney for Nokes.

Wilde, Serjeant, in support of the rule.—In *Threlfall v. Webster*, the documents the production of which the plaintiff required were the very bills upon which the action was founded. Here, the defendant having once delivered an invoice, he had no right to withdraw it in the fraudulent manner he has done. The statement in his affidavit as to the document having been destroyed, is very vague and unsatisfactory: for anything that appears, he may have destroyed it after the motion. As the defendants cannot safely proceed to trial without the bill in question, the proceedings ought to be stayed until the plaintiff shall have delivered a true copy to the satisfaction of the prothonotary (a).

TINDAL, C. J.—It is perfectly clear that the bill first delivered was the property of Nixon either in his own right or as the attorney for Nokes. The reason assigned by the plaintiff when he retired it, viz. that he wished to add items omitted, could not be the correct one. He has done an act which he cannot justify, and which furnishes fair ground for surmising that an undue motive operated upon his mind. I think the justice of the case requires that the rule should be made absolute in the terms sug-

(a) See *Bousfield v. Godfrey*, 2 M. & P. 771, 5 Bing. 418.

gested by my Brother Wilde—the copy, when delivered, to be evidence; and that the costs of this motion should be costs in the cause.

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PARK, J.—I do not like to use a harsher term than the circumstances of the case call for: but I must say the withdrawal of the bill looks very like an act of spoliation on the part of the plaintiff.

The rest of the court concurring —

Rule absolute accordingly (*b*).

Monday,
June 6th, 1836.

THE prothonotary having found, upon the evidence before him, that the bill delivered to Nixon was headed “Nokes and Others,” directed that a copy should be furnished. This determination of the prothonotary was pronounced in the month of December, 1835; and on the sixth day of the following Trinity Term—

Upon a reference to the prothonotary to ascertain a disputed fact, a party cannot, after a term has elapsed since the determination of the prothonotary, have the matter referred back to him to be reheard, on the ground that an absent witness has since been discovered.

Andrews, Serjeant, on the part of the defendants, obtained a rule nisi to refer the matter back to the prothonotary to be re-considered, upon the affidavit of the defendant Nixon, which stated, that, owing to the absence (in Spain, as the deponent had been informed) of one Cooper, who was his confidential clerk at the time the bill in question was delivered, and who had had opportunities

(*b*) See *Pickering v. Noyes*, 1 B. & C. 262, 2 D. & R. 386; *Bassy v. Alexander*, Tidd's Prac. 639, 641; *Blakey v. Porter*, 1 Taunt. 386; *Beale v. Bird*, 2 D. & R. 419; *Harris v. Hill*, 1 D. & R. N. P. C. 17, 3 Stark. 140; *Morrow v. Saunders*, 1 B. & B. 318, 3 Moore, 671; *Gigner v. Bayley*, 5 Moore, 71; *Hildyard v. Smith*, 8 Moore, 586, 1 Bing. 451;

Ratcliffe v. Bleasby, 10 Moore, 523, 3 Bing. 148; *Lord Portmore v. Goring*, 4 Bing. 152, 12 Moore, 363; *Rundle v. Beaumont*, 4 Bing. 537, 1 M. & P. 396; *Rowe v. Howden*, 1 M. & P. 334, 4 Bing. 539 n.; *Blogg v. Kent*, 6 Bing. 614, 4 M. & P. 433. And see *Pontet v. The Basingstoke Canal Company*, post, p. 543.

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of seeing it, the defendants were unable to prove before the prothonotary the fact (which Cooper now positively swore to) that the bill was headed "William Nokes" only.

Atcherley, Serjeant, shewed cause: and, after hearing *Andrews*, Serjeant, in support of his rule—

THE COURT held, that, by analogy to the practice at Nisi Prius, and on motions for new trials, the defendants were not entitled to re-investigate the matter before the prothonotary: but they should have applied either to the prothonotary or to the court to postpone the hearing until the attendance of Cooper could be procured, or they should have applied for a re-hearing within the first four days of the following term, or at all events in the course of the term.

Rule discharged.

Tuesday,
 Nov. 24th.

The Court permitted the tenant in a writ of right to enter up judgment as in case of a nonsuit, the demandant having failed to proceed to trial pursuant to notice.

MASON, Demandant, SADLER, Tenant.

THIS was a writ of right. Issue was joined on the 17th July, 1834. The grand assize was sworn at the Guilford Assizes, on the 31st July. Notice of trial was given for the Summer Assizes, 1835, but the demandant made default; his attorney having discovered too late that the grand assize should have been re-sworn at the Spring Assizes preceding.

Channell, on a former day, on the part of the tenant, obtained a rule nisi for judgment as in case of a nonsuit.

S. B. Harrison shewed cause.—Judgment as in case of a nonsuit can only be entered in those cases where the statute 14 Geo. 2, c. 17, enables a defendant to carry down the record by proviso, and that statute does not apply to real actions—*Denman*, Dem., *Bull*, Ten., 11 Moore, 443;

3 Bing. 499. In a case of doubt any excuse, however slight, will avail a plaintiff.

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Ten.

Channell, in support of his rule, referred to *Newman v. Goodman*, 2 W. Blac. 1093, 1110, and *Almgill v. Pier-son*, 1 B. & P. 103, as authorities to shew that judgment as in case of a nonsuit may be entered against a demandant in a writ of right.

PER CURIAM.—It is by no means certain that the statute 14 Geo. 2, c. 17, does apply to real actions: but, inasmuch as the matter will appear upon the record, and the parties will have an opportunity of correcting it by writ of error if wrong, the rule may be made absolute.

Rule absolute.

FINCH v. BROOK.

Tuesday,
Nov. 24th.

THIS was an action of *debt* brought in the county court of Cambridgeshire to recover from the defendant the sum of 1*l.* 13*s.* The defendant pleaded nil debet except as to 1*l.* 12*s.* 5*d.*, and as to that sum a tender, upon which issue was taken. The jury found specially that the defendant did not owe any part of the sum demanded except as to 1*l.* 12*s.* 5*d.*, and as to that sum they found certain facts, concluding as follows—"But, whether or not upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found, the defendant did tender and offer to pay to the said plaintiff the said sum of 1*l.* 12*s.* 5*d.*, parcel &c., in manner and form as the said defendant has above in his said plea alleged, the jurors aforesaid are altogether ignorant, and therefore they pray the advice of the said court here thereupon: and if, upon the whole matter

To debt in a county court for 33*s.*, the defendant pleaded nil debet except as to 1*l.* 12*s.* 5*d.*, and as to that sum a tender. The jury found that the defendant did not owe anything except as to the 1*l.* 12*s.* 5*d.*, and as to that sum, they found specially certain facts upon which judgment was entered for the defendant in the county court. Upon a writ of false judgment, this court reversed

the judgment of the court below; holding that the circumstances found by the jury did not amount to a tender. The court allowed the plaintiff to enter up judgment for the debt and also for the costs in the court below, to be taxed by the prothonotary.

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aforesaid, it shall appear to the said court, that the said defendant *did* tender and offer to pay to the said plaintiff the said sum of 1*l.* 12*s.* 5*d.*, parcel &c., in manner and form as the said defendant hath above in his said plea alleged, the jurors aforesaid upon their oath aforesaid say that the said defendant *did* tender and offer to pay the said plaintiff the said sum of 1*l.* 12*s.* 5*d.*, parcel &c., in manner and form as the said defendant hath above in his said plea alleged; and if, upon the whole matter aforesaid, it shall appear to the said court here that the said defendant *did not* tender and offer to pay the said plaintiff the said sum of 1*l.* 12*s.* 5*d.*, parcel &c., in manner and form as the said defendant hath above alleged, then the jurors aforesaid upon their oath aforesaid say that the said defendant *did not* tender or offer to pay the said plaintiff the said sum of 1*l.* 12*s.* 5*d.*, in manner and form as the said defendant hath above in his said plea alleged."

Upon this special verdict, the county clerk held that the facts therein stated amounted to a legal tender; and a verdict was entered for the defendant. A writ of false judgment was thereupon brought, and this court held, that, although the facts found by the jury would have warranted them in inferring a legal tender, yet, as they had not in fact drawn such an inference, the court was not at liberty to do so. The judgment of the court below was accordingly reversed—See 1 New Cases, 253, 1 Scott, 70.

Stephen, Serjeant, on a former day in this term, obtained a rule nisi that judgment be entered up in this court for the plaintiff for 1*l.* 12*s.* 5*d.*, the debt, and also for the amount of the costs in the court below, such costs to be previously taxed by one of the prothonotaries of this court; and that the plaintiff be at liberty to issue execution for the amount of the said debt and costs when

taxed (a). He cited *Gildart v. Gladstone*, 12 East, 668, where, judgment having been given in this court for the plaintiffs on special verdict in assumpsit, which was reversed upon writ of error in the King's Bench; it was held that the defendant was entitled there not only to judgment of acquittal, but also for the costs of his defence in this court, being the same judgment which the court below ought to have given; the defendant in such case being entitled to his costs by the statute 23 Hen. 8, c. 15.

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Bull shewed cause.—The court has no jurisdiction, no power to enter up judgment for costs in the court below, upon a writ of false judgment; all they have before them is a mere transcript of the record of proceedings in the county court. In Tidd, 9th edit. p. 1188, the practice is thus stated: "When the parties are once in court, the subsequent proceedings are the same as in error: and if a writ of false judgment abate, or the plaintiff therein be nonsuited, the defendant shall have a scire facias quare executionem non. On a writ of false judgment, *no costs are in general recoverable*." At all events, assuming the court to have a general jurisdiction to do that which this rule prays, it clearly cannot be done upon this record: there is no finding that will warrant the entry of a judgment for the plaintiff. In *Gildart v. Gladstone* the court had before them the materials upon which to found their judgment: those materials are wanting in the present case. The jury should have gone on to say, that, if the court should be of opinion that there was no legal tender, then they found that the defendant was indebted to the plaintiff in the sum of 1*l.* 12*s.* 5*d.*, with nominal damages for the detention of the debt. A court of error is bound to give the same judgment upon reversal which the court below

(a) It was admitted that costs in the court above were not recoverable.—See *Scott v. Bye*, 9 Moore, 649.

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ought to have given—*Rex v. Amery*, 1 Anst. 178; *Denn d. Mellor v. Moore*, 1 B. & P. 30: and here the jury not having given any alternative verdict for the plaintiff, with so much damages, how could the court below supply the defect? [*Tindal*, C. J.—This objection should have been taken when the writ of false judgment was argued: it is now too late. Besides, here *is* an alternative finding for the plaintiff, though not strictly according to the usual form.] There is no finding at all as to the 1*l.* 12*s.* 5*d.* [*Tindal*, C. J.—The defendant pleads not guilty, except as to 1*l.* 12*s.* 5*d.*, and as to that sum a tender; the jury find in effect that there has been no tender: the debt, therefore, stands admitted upon the face of the record.]

Stephen, Serjeant, in support of the rule.—All the plaintiff asks is, that this court will give such judgment as the court below ought to have given.

TINDAL, C. J.—It appears to me, upon general principles, and also upon the authority of *Gildart v. Gladstone*, that this court is bound, upon a writ of false judgment, to give such judgment as the justice of the case requires, and as the court below should have pronounced between the parties. The only question for our consideration is, whether or not we can give judgment upon this record. It appears that the plaintiff in the court below demanded a debt of 1*l.* 13*s.* The defendant pleaded nil debet, except as to 1*l.* 12*s.* 5*d.*, and as to that sum a tender, upon which issue was taken. The jury found that the defendant did not owe any part of the sum demanded except as to the 1*l.* 12*s.* 5*d.*, and as to that sum they found certain special circumstances, leaving it to the court to determine whether or not the facts so found constituted a legal tender. The county clerk, holding that the facts did shew a legal tender, entered a verdict for the defendant: and the case came before us upon a writ of

false judgment, in Hilary Term last. Upon that occasion we held, that, although the facts found by the jury would have warranted them in inferring a tender, yet, as they had not done so, we were not at liberty to supply the omission; and consequently we reversed the judgment of the court below. The case therefore stands thus: in an action of debt for 1*l.* 13*s.*, with a plea of nil debet as to all but 1*l.* 12*s.* 5*d.*, and as to that a tender, the jury find that there has been no tender. Upon this it is objected that there is nothing to warrant a judgment for the plaintiff, the jury not having in terms found the 1*l.* 12*s.* 5*d.* to be due. I see no necessity for such a finding: there was no issue upon it, and the existence of the debt is admitted upon the record. I agree that, in strict form, the jury should have found nominal damages for the detention of the debt: but the difficulty may be got over by the plaintiff releasing the damages. In *Bentham's* case, 11 Rep. 56. a., Marsh brought a writ of annuity against Bentham, and the parties came to issue, which was tried for the plaintiff, and found the arrearages &c., but the jury did not assess any damages or costs; which verdict was imperfect, and could not be supplied by writ of inquiry of damages; but the plaintiff released his damages and costs, and thereupon had judgment; upon which the defendant brought a writ of error, and assigned the error aforesaid, scil. the insufficiency of the verdict: sed judicium affirmatur, because the plaintiff had released his damages and costs, which was for the defendant's benefit. In Comyns's Digest, *Damages* (E. 8.) it is said: "Where damages are not the only thing to be recovered, the plaintiff may supply a defect in the assessment of the damages, by his release of the damages: as in *debt*, annuity, &c. But, if the jury do not assess damages, where the damages *only* are recoverable, it cannot be aided by a release." And see 2 Roll. Abr. 722, l. 30. The plaintiff therefore being willing to release the damages, it appears to me that there is a perfect finding

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upon this record, shewing by necessary intendment that the jury believe 1*l.* 12*s.* 5*d.* to be due from the defendant to the plaintiff; and this seems to me to dispose of the objection. Had this been an action of debt in which nil debet only was pleaded, and the jury merely found that a certain sum was due from the defendant, we must have sent the cause down again. But there being upon this record an admission of the defendant that the 1*l.* 12*s.* 5*d.* are due to the plaintiff unless there has been a legal tender, and the jury having negatived the tender, I think we are fully authorized to enter judgment for the plaintiff for that sum (the plaintiff, if he be so minded, releasing the damages), and for such costs as the county court could have given.

PARK, J. concurred.

GASELEE, J.—The record in this case appears to me to be free from any serious objection. The debt demanded is 1*l.* 13*s.*; the defendant pleads nil debet except as to 1*l.* 12*s.* 5*d.*, and as to that sum a tender; the jury find nothing due except the sum alleged to have been tendered, and, as to that sum, they find specially circumstances which in the opinion of the court do not amount to a legal tender. The sum of 1*l.* 12*s.* 5*d.*, therefore, stands admitted upon the record to be due to the plaintiff; and for that sum he is entitled to judgment.

BOSANQUET, J.—The simple question before the court on the former occasion was whether or not there had been a legal tender; for, it was admitted upon the record that a debt of 1*l.* 12*s.* 5*d.* was due unless the tender were established. The jury found that there was nothing due beyond that sum: and the court were of opinion that the facts found did not warrant their holding that the alleged tender was legal. Consequently the plaintiff is entitled to judgment for the 1*l.* 12*s.* 5*d.*; and that is the judgment the court below ought to have pronounced.

Rule absolute.

Butt observed, that, if the plaintiff was not entitled to *damages*; he could not be entitled to costs of any description (b).

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Stephen, Serjeant.—The plaintiff will exercise his own discretion as to whether or not he will enter a remittitur of the *damages*.

Thursday,
April 28th,
1836.

On the 9th December, 1835, the costs of the plaintiff in the court below were according to the above rule taxed, and the prothonotary made his allocatur for 12*l.*, the amount of those costs, *on the back of the rule*. On the 18th, execution was executed against the defendant for the debt, 12*l.* for costs, and sheriff's poundage &c., amounting together to 17*l.* 6*s.* 6*d.* The *fi. fa.* was issued upon presenting to the proper officer the rule of court with the prothonotary's allocatur thereon; and the writ recited the rule as its foundation. The *damages* were not released.

The costs having been taxed and an allocatur signed upon the rule, the plaintiff sued out a writ of *fi. fa.* and levied thereunder the debt and costs. The court ordered it to be set aside, no judgment having been entered up or signed to warrant it.

Butt, for the defendant, on the 27th January, 1836, upon an affidavit that no *judgment* had been entered up or signed, obtained a rule calling upon the plaintiff to shew cause why the writ of execution should not be set aside, and why the sum of 17*l.* 6*s.* 6*d.* paid thereunder by the defendant should not be refunded to him. He objected that the execution was not issued upon a judgment, none having been entered or even signed; but on the rule of court, so as to avoid the entering of the remittitur which the court decided that the plaintiff must do before issuing execution; and that, at all events, the execution should have issued for the *debt* only.

Stephen, Serjeant, shewed cause, upon an affidavit stating that inquiry had without effect been made at the pro-

(b) "If it be doubtful whether *not the costs.*" Com. Dig. *Damages*, (E. 8.)
damages can be given, the plaintiff may release the damages, and

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per office as to the mode of entering up judgment in the matter of a writ of false judgment from a county court, and that no precedent could be found applicable to the case. The taxation of costs is in effect the signing of judgment(c); and it is not necessary to enter the judgment on the roll before suing out execution; indeed the constant course is otherwise: if, therefore, it were necessary to sign judgment, it has substantially been done in the only way in which it could be done. In Style's Pr. Reg. it is said that the signing judgment is but the leave of the court to enter judgment. And there is nothing in the form of this rule to take it out of the general practice, or to make it incumbent on the plaintiff to enter a remittitur of the damages. [*Tindal*, C. J.—The question seems to be whether the plaintiff should not have proceeded by attachment instead of by execution]. The rule pronounced by the court authorizes the issuing of an execution. [*Butt.*—By the statute of Gloucester, 6 Edw. 1, c. 1, the plaintiff is only entitled to costs in cases where he is entitled to damages: therefore the proceeding would be equally objectionable whether by execution or by attachment]. [*Tindal*, J. C.—Should not the costs have been taxed on the proceedings in the court below—on the writ of false judgment?] The proceedings in the court below form no part of the records of this court: the rule of court was the only thing upon which the allocatur could be marked. There is no *postea*, no record of any sort upon which to act: the costs have been taxed, the allocatur signed, and execution issued in strict obedience to the directions of the rule. At all events, the court will not give effect to this application, unless it be shewn wherein consists the irregularity complained of, and how the judgment ought to have been signed.

(c) In *Butler v. Bulkeley*, 8 Moore, 104, 1 Bing. 233, it is said that judgment is not final on the officer's marking the record, but

on his completing the taxation of costs by inserting their amount in the allocatur.

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TINDAL, C. J.—This cause came before us upon an incidental motion in Michaelmas Term last; and, after hearing the parties, we held that the plaintiff was entitled to judgment and execution for the debt and the costs in the court below—understanding, of course, that such judgment would be signed in the regular way; leaving it to the discretion of the plaintiff to enter a remittitur of the damages or not as he might be advised, it being doubtful whether, there being no award of damages, the plaintiff could have costs. Instead, however, of signing or entering judgment, the plaintiff has proceeded to tax the costs upon the rule of court, and issued execution thereon. It appears to me that the course adopted is irregular whether as a proceeding upon a rule of court or upon a supposed judgment: if a proceeding upon a rule of court, it should have been by attachment; and there has been no regular judgment entered or signed so as to authorize the issuing of a *fi. fa.* Who ever heard of a judgment on a rule? It was a very irregular and unfair thing to attempt, by issuing execution upon the rule, to deprive the defendant of the opportunity of raising upon the record the question whether the judgment *for costs* would be regular. The practice upon a writ of false judgment is the same in all respects as upon a writ of error: in the latter, the course is, to attend the clerk of the errors, enter the judgment on the judgment roll, take the rule for judgment and the roll to the master, who thereupon marks the roll and proceeds to the taxation of the costs. In the present case, nothing has been done that is at all analogous to that. The costs have been taxed and execution issued upon a mere rule of court. Our officer informs us that no signature upon such an instrument is ever considered as a signing of judgment. I think this rule must be made absolute.

PARK, J., and VAUGHAN, J., concurred.

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BOSANQUET, J.—It was incumbent upon the plaintiff at least to shew to the court that there existed in this case circumstances to dispense with his entering the judgment on the record.

Rule absolute.

Tuesday,
Nov. 24th.

CLARK and Another, Assignees of SCRIVENER, a Bankrupt, v. GILBERT.

The defendant having in his possession a lease belonging to one S., which had been deposited with him as a security for monies advanced by him to S., and upon which he claimed a lien for costs as against S. and also as against the assignee appointed under a commission of bankrupt issued against S. in 1830, concurred with the assignee in the sale of the lease, and received from him, in satisfaction of his demand, the amount of the purchase money, and also received with

ASSUMPSIT for money alleged to have been received by the defendant to the use of Scrivener before his bankruptcy, and to the use of the plaintiffs as his assignees since the bankruptcy. At the trial a general verdict was found for the plaintiffs for 332*l.* 2*s.*, subject to the opinion of the court upon the following case:—

By indenture of lease bearing date the 17th November, 1828, certain premises in Ratcliffe Highway, in the county of Middlesex, were demised by Abraham Gale and Thomas Gale to Scrivener, the bankrupt, for the term of eighty-one years, at a rent of 100*l.* At the time of issuing the commission against Scrivener, the bankrupt, he was indebted to the defendant, an attorney, in 234*l.* or thereabouts, for monies advanced to him by the defendant, and for professional business done; and the defendant had possession of the lease as Scrivener's attorney. Whilst the defendant was in possession of the lease, viz., on the 5th December, 1829, Scrivener, by indenture bearing date the 1st January, 1830, assigned the premises to the defendant, and the defendant, as solicitor to the assignee, had notice that a petition to supersede the commission, on the ground of the insufficiency of the petitioning creditor's debt, was pending. In January, 1832, the commission against S. was superseded, and in March a second fiat issued against him: Held, that the assignees under the last-mentioned fiat were entitled to recover from the defendant the several sums so received by him from or with the assent or under the authority of the assignee under the superseded commission.

on that day, mortgaged by way of demise part of the said premises to his father Abraham Scrivener, to secure 600*l.* and interest. On the 30th December, 1829, a commission of bankrupt issued against the mortgagor, the said Scrivener, upon the petition of one William Stevens, who was afterwards appointed sole assignee of the estate and effects of the bankrupt; and an assignment thereof was made to him accordingly. The defendant was Stevens's attorney, both as petitioning creditor and assignee under that commission; which commission was afterwards superseded as hereinafter mentioned. On the 26th March, 1830, a petition to the Great Seal was presented by Augustus White, a creditor, to supersede the commission of bankrupt, on the ground of the insufficiency of the petitioning creditor's debt; upon which petition the defendant appeared as solicitor for the petitioning creditor and assignee, W. Stevens: and after some time an order was made upon that petition to supersede the commission. After notice of the petition, and whilst the same was pending, Stevens, as assignee, with the concurrence of the defendant, caused the interest of the bankrupt in the premises comprised in the said lease, subject to the mortgage, to be sold by auction; and one George Pound became the purchaser at the price of 350*l.* At the time of the purchase, Pound paid, by way of deposit, 50*l.* into the hands of the auctioneer, who, after retaining 46*l.* 6*s.* for the expenses of the sale, paid over the balance, amounting to 3*l.* 14*s.*, by his cheque, to Stevens, which cheque Stevens immediately paid to the defendant on account of his costs and the lien which he claimed on the deeds.

By indenture bearing date the 8th June, 1830, made between Stevens as assignee of the first part, the bankrupt of the second part, and the said G. Pound of the third part, reciting (inter alia) the mortgage to Abraham Scrivener, and also that, in consideration thereof, it had been agreed between Stevens and Pound, that Pound should

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v.
GILBERT.Commission
against Scriven-
er, Dec. 30th,
1829.Petition to su-
persede.Sale of bank-
rupt's interest
in the lease
after notice of
the petition to
supersede.Receipt by de-
fendant of
3*l.* 14*s.*, part of
the purchase-
money.Assignment to
Pound.

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Receipt by defendant of 300*l.* residue of the purchase-money ;

10*l.* for a contribution to a party-wall,

6*l.* 10*s.* and 11*l.* 18*s.* for rent of the demised premises.

take the premises subject thereto, and should pay Stevens 350*l.* and no more, Stevens and the bankrupt assigned the lease before mentioned, and the premises thereby demised, to Pound for that sum, subject to the before-mentioned mortgage, and also subject to certain underleases which had been granted. The deed of assignment to Pound was prepared by his attorney, and was approved of on Stevens's behalf by the defendant, and executed in his office. At the time of the execution of the said indenture of assignment, viz. June, 1830, the residue of the consideration money, after allowing the 50*l.* paid by way of deposit to the auctioneer, being 300*l.*, was paid by the attorney of Pound to Stevens the assignee, and by him to the defendant, by whom it was received generally, the defendant having a claim for such lien as aforesaid, and Stevens being indebted to him for costs.

In the course of the year 1830, the defendant, by the authority of Stevens as assignee, received three further sums of money, viz. 10*l.*, a debt due to the bankrupt from the owner of a house adjoining the said premises of the bankrupt in Ratcliffe Highway, for contribution towards the expense of erecting a party-wall between the house of such owner and the said premises of the bankrupt, such sum of 10*l.* being the share of the expense of erecting such party-wall to be borne by the said owner, according to an agreement to that effect made between such owner and the bankrupt before his bankruptcy ; and 6*l.* 10*s.* and 11*l.* 18*s.* for rent in respect of the demised premises. At the time of the receipt by the defendant of the said sums of 3*l.* 14*s.*, 300*l.*, 10*l.*, 6*l.* 10*s.*, and 11*l.* 18*s.*, he had also a claim against Stevens for his professional bill for business in suing out and prosecuting the said commission of bankruptcy, which claim, together with the said sum due from Scrivener at the time of his bankruptcy, considerably exceeded the amount of the sums so received. The said lease remained in the possession of the defendant after the execution of

the mortgage, and from thence until after the receipt by the defendant of the said sums of 3*l.* 14*s.*, 300*l.*, 10*l.*, 6*l.* 10*s.*, and 11*l.* 18*s.*

By indenture bearing date the 5th August, 1831, between Abraham Scrivener, the bankrupt's father and mortgagee, of the one part, and Pound of the other part, the draft of which indenture was settled and approved of by the defendant on behalf of Pound—reciting the said lease, mortgage, and assignment; and also reciting that the bankrupt had built upon the said piece or parcel of land several messuages or tenements and dwelling-houses, and carcasses, and other erections; that the said Abraham Scrivener had, in the month of April, 1830, undertaken, on account of the bankrupt, to pay out of his said mortgage money unto the defendant several sums of money amounting to 234*l.*; that the said Abraham Scrivener had, on the 8th June, 1830, become liable to pay out of his said mortgage money unto the defendant, on account of the bankrupt, the further sum of 50*l.*; that, for the purpose of paying unto the said Abraham Scrivener his said mortgage money or sum of 600*l.*, G. Pound had then lately offered for sale by public auction the said leasehold premises in divers lots, but that the greater part thereof had been bought in for want of adequate prices for the same; that Abraham Scrivener being then far advanced in life, and much debilitated in his constitution, and very desirous of having his mortgage money paid, and of adjusting his several liabilities on account of the bankrupt, and of satisfying a further debt due from the bankrupt to the defendant, had applied to G. Pound to pay to him his mortgage money or sum of 600*l.*, but that G. Pound, not being provided with money to pay the same, had prevailed upon the defendant to release the said A. Scrivener and the bankrupt from all claims and demands whatsoever, and to take his security for the due performance of all such liabilities and payments as aforesaid; that such arrangement had been approved of by the said A.

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Scrivener; that, as some loss might be sustained by G. Pound on account of the reduced value of the leasehold premises, the said A. Scrivener had consented to receive the further sum of 240*l.* in full and complete satisfaction of his said mortgage debt or sum of 600*l.*; that G. Pound had secured, to the satisfaction of the defendant, the money so due and owing to him from A. Scrivener and the bankrupt; that, in consequence thereof, the defendant had, by deed poll under his hand and seal, bearing even date with the indenture now in recital, released A. Scrivener from all liabilities in respect of the bankrupt, and from all other claims and demands whatsoever; and that the defendant had, in like manner released the bankrupt from the said debt—It was witnessed, that, in pursuance of the said agreement, and for the considerations therein mentioned, and in consideration of the sum of 240*l.* in hand paid by Pound to A. Scrivener (and which A. Scrivener did thereby admit and acknowledge to be in full payment and satisfaction of his said mortgage debt or sum of 600*l.*, and thereof and from the same did by the said indenture for ever acquit, release, and discharge Pound, his executors, administrators, and assigns, and every of them), the said A. Scrivener did thereby grant, bargain, sell, assign, surrender, and yield up unto Pound the premises comprised in the indenture of mortgage, and also the indenture of lease and mortgage, and all other deeds and documents whatsoever of or relating to the mortgaged premises: to have and to hold the same unto Pound for all the remainder of the said mortgage term, so as that the said term might merge and fall into the reversionary and other estates and term of Pound in the said premises, and form part thereof.

The deed of 5th August, 1811, was approved of by the defendant on behalf of Pound, and was executed in the defendant's office, and in his presence. On the 16th January, 1832, the commission of bankrupt was superseded, in pursuance of an order made by the Vice-Chancellor upon

Supersedes of
first commis-
sion.

the petition of the said Augustus White. On the 14th March, 1832, a fiat in bankruptcy was awarded against Scrivener, upon the petition of T. F. Sibley, under which he was duly declared a bankrupt upon an act of bankruptcy committed on the 21st December, 1829. The plaintiffs were afterwards duly appointed assignees under such fiat; and the estate and effects of the bankrupt became and were thereby vested in the plaintiffs pursuant to the statutes of bankruptcy. At the trial the plaintiffs put in evidence the following documents, viz. the first commission, bearing date the 30th December, 1829; the petition to supersede the same, dated 26th March, 1830; the supersedeas, dated the 16th January, 1832; the fiat, dated the 14th March, 1832, and inrolled the 6th March, 1833; the appointment of the plaintiff Clark as official assignee, dated the 24th March, 1832; and the appointment of the plaintiff White as assignee, dated the 10th April, 1832. Stevens was called, who stated (among other things) that he was indebted to the defendant between 300*l.* and 400*l.* in respect of the first commission and subsequent proceedings; that the bankrupt, prior to his bankruptcy, told him that the lease and title deeds were deposited with the defendant, to whom he owed between 200*l.* and 300*l.*; that the defendant had a lien thereon; and that he, Stevens, had paid the 3*l.* 14*s.* and 300*l.* to the defendant; and allowed him to receive the other sums. Stevens also identified an account which had been signed, sworn to, and exhibited by him as assignee, in November, 1830, before the commissioners under the first commission.

The defendant, after the plaintiffs' case was closed, put in that account, which, however, the plaintiffs objected to as not admissible in evidence against them; but the learned judge received the account, subject to the question of admissibility, which was reserved for the opinion of the court. The plaintiffs then put in and read copies of two examinations of the defendant before the commissioners under the

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Second fiat
against Scrive-
ner, under
which plaintiffs
appointed
assignees.

Evidence.

Objections to
evidence.

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second fiat, dated respectively the 28th April and the 17th May, 1832.

The questions for the opinion of the court were—First, whether the above-mentioned account was admissible in evidence on behalf of the defendant—and Secondly, whether, upon the state of facts as they would stand after the decision of the first question, the plaintiffs were entitled to recover any, and, if any, which of the said sums of 8*l.* 14*s.*, 300*l.*, 10*l.*, 6*l.* 10*s.*, and 11*l.* 18*s.* If the court should be of opinion that the plaintiffs were entitled to recover, a verdict was to be entered for such amount as the court should direct. If the court should be of a contrary opinion, a nonsuit was to be entered.

James Manning, for the plaintiffs.—At the time of the receipt of the several sums of money sought to be recovered in this action, the defendant was aware that the title of Stevens, from whom or under whose authority he received those sums, was impeached; the commission issued against Scrivener upon the petition of Stevens being invalid, for want of a good petitioning creditor's debt: and, that commission being superseded, and a new and valid one issued, the assignees appointed under this second commission are clearly entitled to recover in an action for money had and received. *Stead v. Thornton*, 3 B. & Ad. 357, is an authority to shew that there is sufficient privity between these parties to enable the plaintiffs to maintain this action. There, the assignee of a bankrupt, being insane, was removed, and a new one appointed; and it was held that the new assignee was entitled to maintain an action for money had and received against one who had received money in the character of agent to the late assignee. Lord Tenterden there said: "We are not called upon to decide how the case would be if the defendant had received this money as the duly constituted agent of the former assignee. He could not be so, that assignee

having been incompetent to appoint any agent. He is, therefore, in the situation of any other person who has received and has in his hands a part of the bankrupt's estate, and is undoubtedly liable to those who represent that estate." Probably the plaintiffs would not have been entitled to sue either the defendant or Stevens in trover for deeds deposited with the latter: but, the moment they were disposed of, the proceeds became money had and received to the use of the assignees of the depositor—*Walker v. Laing*, 7 Taunt. 568, 1 Moore, 281. No lien therefore can be set up as against the 300*l.* and the 3*l.* 14*s.*; and it is perfectly clear, that, if any lien ever existed, it could not extend to the 10*l.* received by the defendant in respect of the party-wall, or to the 6*l.* 10*s.* or 11*l.* 18*s.* received for rent.

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Busby, for the defendant.—No fraud can be presumed in this case; none is alleged: but the mere question is, whether there is such a privity between the parties as will enable the plaintiffs to maintain this action. The defendant was Stevens's agent: and the action, therefore, if maintainable at all, should have been brought against Stevens. "If the receipt of this money," says Parke, J., in *Stead v. Thornton*, "had taken place under such circumstances that the former assignee could be charged with it, as he might if he had received it by his agent or clerk, I should have thought this action not maintainable. But here the receipt was that of the defendant alone, who stood in the situation of a mere stranger, and held the money subject to the claim of the assignees who might be afterwards appointed." In *Stephens v. Badcock*, 3 B. & Ad. 354, J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues for the client (which he was authorized to do), and gave a

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receipt signed "B., for Mr. J." When he left home, J. was in bad circumstances, and he never returned; but it did not appear that his intention so to act was known at the time of the payment to B. B. afterwards refused to pay over the money to the client: and on assumpsit brought against him for money had and received—the court held that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it; the master on the other hand, being answerable to the client for the sum received by his clerk; and there was no privity of contract between the plaintiff and defendant. And in *Baron v. Husband*, 4 B. & Ad. 611, 1 N. & M. 728, the solicitor to the assignees of a bankrupt received from them a sum of money, to be applied in payment of the costs of the petitioning creditor up to the time of the choice of assignees: the solicitor offered to pay the money on condition that the bill should undergo a subsequent taxation, but to that the petitioning creditor declined to assent: it was held that no promise arose upon this offer, the terms not being acceded to; and that, without the promise, there was no privity of contract to support an action for money had and received. Lord Denman, in delivering the judgment of the court, says: "The defendant received the money as the agent of the assignees, and not of the plaintiff; he held it subject to their control and directions, and would continue to be accountable to them until he entered into some binding engagement with the plaintiff to hold it for his use. As soon as that engagement was entered into, and not until then, he would hold the money for the plaintiff's use. This is the doctrine laid down in *Williams v. Everett*, 14 East, 582, *Wharton v. Walker*, 3 Mer. 652, *Scott v. Porcher*, 4 B. & C. 163, 6 D. & R. 288, *Wedlake v. Hurley*, 1 C. & J. 88, and has been acted upon in many other cases. In this case there has been no such engagement. The defendant never promised to pay the plaintiff, except upon a condi-

tion to which he would not assent, viz. that his bill should undergo a subsequent taxation." Supposing the money here to have been received by the defendant as the agent of Stevens, it is clear from these authorities that the present action is not maintainable. On the other hand, the action is equally incapable of being sustained if the defendant be taken to have received the money as a creditor of the estate; Stevens being, at the several times of the payment and receipt of the money, assignee. [*Tindal, C. J.*—Stevens, though assignee de facto, was not legally assignee; there was no valid commission—no petitioning creditor's debt.] In *Gould v. Shoyer*, 6 Bing. 738, 4 M. & P. 685, it was held that the assignees of a bankrupt are not bound by a sale under a former superseded commission; but may recover back the property, although the purchase were strictly bonâ fide. But that was an action of trover for a lease; and there is a wide distinction between a thing subsisting in specie, and capable of being followed and identified, and money which cannot be earmarked (a)—*Miller v. Race*, 1 Burr. 452. In *Rogers v. Kelly*, 2 Camp. 123, where the plaintiff paid a sum of money into a banker's for a specific purpose, and the banker's clerk by mistake paid it to the defendant, who had no right to it: it was held that the plaintiff could not maintain an action against the defendant to recover it back. Lord Ellenborough said: "There is no privity between the parties to this suit. The plaintiff's claim is on the bankers, and they must seek their remedy against the defendant the best way they can. The plaintiff's

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(a) It is pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said 'that the reason why money cannot be followed

is, because it has no ear-mark.' But this is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency." Per Lord Mansfield, in *Miller v. Race*, 1 Burr. 457.

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money must still be considered as in the hands of the bankers. His account with them is the same as if this mistake had not been committed." The inconvenience of holding that money received under circumstances like the present may be recovered back, will be very great: it would extend to this, that, where a dividend has been paid under a commission that is afterwards superseded, each creditor who has received a payment in respect of his debt will be liable to an action at the suit of the assignees appointed under a second commission to recover back the amount. Here, the defendant clearly had a lien upon the deeds deposited with him—*Stevenson v. Blakelock*, 1 M. & S. 535: and as equitable mortgagee he was entitled to receive the 10*l.* for the party-wall, and 6*l.* 10*s.* and 11*l.* 18*s.* for rent—*Sumpter v. Cooper*, 2 B. & Ad. 223. There, a debtor deposited the title deeds of houses with his creditor as a security, and afterwards executed an assignment of his interest in the houses to the same party; but this instrument was never registered, pursuant to the statute 7 Ann. c. 20. The debtor afterwards became bankrupt, and the assignment of his effects under the commission was duly registered. The assignees brought an action against the creditor for the rents of the houses which he had received from the time of the assignment made to him by the bankrupt: it was held, that, although this instrument was void, the rents which the defendant, being equitable mortgagee, had received, could not be taken out of his hands by virtue of the registered assignment under the commission.

Manning, in reply.—Admitting, for the sake of argument, that the defendant had a lien upon the deeds, by his concurrence in the sale that lien was destroyed, and consequently the plaintiffs are entitled to recover. The sale was tortious; but the plaintiffs may waive the tort, and sue for the proceeds—*Marsh v. Keating*, 1 New Cases, 198, 1 Scott, 5. There, one F., a partner in the plaintiffs'

house, transferred certain stock out of the defendant's name in the books of the Bank of England, under a forged power of attorney, and without any authority from her, and caused the produce to be mixed with the money of the firm. F. having been convicted of another forgery committed under similar circumstances, and executed—it was held that the defendant might recover the amount in an action against the surviving partners for money had and received to her use. In that case the party might have had a remedy against the Bank. Where creditors receive dividends under a commission that is afterwards superseded, *bonâ fide*, and without notice of its invalidity, they cannot be called upon to refund; but they may where they have received the money (as the defendant in this case did) with full knowledge of all the circumstances.

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Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—In this case, the plaintiffs, who are assignees of the bankrupt Scrivener, sue for money had and received by the defendant since the bankruptcy to their use as assignees. All the money which has come to the hands of the defendant consisted of payments made to him in the course of the year 1830, and, consequently, subsequent to the act of bankruptcy, which took place on the 21st December, 1829: such payments, however, were made to the defendant under circumstances which fall under two distinct heads of consideration.

No question can arise in this case on the ground that the fiat of bankruptcy under which the present plaintiffs are assignees was not awarded until the 14th March, 1832; because the former commission, which was superseded, was in force before and at the time when the several payments in question were made; and such payments must consequently be taken to have been made after notice of an act of bankruptcy, according to the provision of the

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83rd section of the late bankrupt act, and to be protected by the provisions of that statute. The facts, indeed, of the present case can leave no doubt that there was not only constructive, but actual notice of the act of bankruptcy on which the present fiat was awarded; the former commission having been taken out by the defendant himself as solicitor to Stevens the petitioning creditor, and the defendant having been afterwards appointed and having acted as solicitor to the first commission, when Stevens had been chosen assignee.

Now, the ground upon which the defendant disputes the plaintiffs' right to recover in the present action is shortly this, that all the payments were made to the defendant by Stevens, the assignee under the first commission, or with his concurrence, whilst such first commission was in full force; and that they were made by him in satisfaction of a debt due from the bankrupt to the defendant, for which the defendant held a lease and title deeds of the bankrupt, as a pledge or security: and it is argued that there can be no privity of contract between the present plaintiffs, the assignees under the second fiat, and the defendant, a creditor under the first commission, but that the only action maintainable by the present assignees for the recovery of money of the bankrupt which came to Stevens's hands, must be an action against Stevens himself, not against the separate creditors amongst whom he divided it. And the case of *Stead v. Thornton*, 3 B. & Ad. 357, n., is relied upon as affording an inference that such was the opinion of the court of King's Bench. It was also further objected, that, as the money was first received by Stevens, and then handed over by him to the defendant, this money cannot be followed into the hands of the defendant by any mark or trace, but must be considered for the purpose of being recovered as still remaining in the hands of Stevens. We think, however, the facts stated in this case will enable us to come to a decision upon it without giving any

opinion upon the abstract question which has been argued before us. For, as to two of the sums in dispute, namely, the sum of 300*l.*, and the sum of 3*l.* 14*s.*, it appears that they were part of the proceeds arising from the sale of a lease belonging to the bankrupt. Now, that lease, at the time of such sale, was in the possession of the defendant as a pledge or security for the payment of his demand against the bankrupt; being either in his possession as solicitor, under a claim upon it for his lien which the law gives him, or having been expressly deposited with him as a security for his demand, according to the evidence of Stevens. In either case, the right and power of the defendant over the lease was precisely the same; he had the right to retain the lease in his possession until his demand was paid, and so far, by means of the possession of the lease, to enforce payment of his demand: but he had that right only; he had no right to sell the lease and to pay himself his demand out of the proceeds. So long as the lease remained in his possession, neither the bankrupt nor his assignee could retake it, without either payment of his demand, or a tender and refusal, which is equivalent to payment. But, if, instead of keeping the thing pledged, he sells it, or enables any other person to sell it, by concurring in the sale, he is guilty of a direct conversion, and makes himself liable for the value of the lease in an action of trover. Such a case is the same in principle as that put by Littleton, s. 71—"If I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending." On which Lord Coke adds this commentary: "The reason is, that, when the bailee, having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may bring an action of trespass on the case for the conversion, at his election." Or again, the case becomes that of the working of a distress, or the sale of a

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v.

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As to the 3*l.*
14*s.* and 300*l.*,
the proceeds of
the sale.

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distress before the statute of William & Mary gave a power of sale, which was always held a conversion—*Bagshawe v. Goward*, Cro. Jac. 148; *Gomersall v. Medgate*, Yelv. 194.

In the present case, therefore, upon the sale of the lease by the defendant, the plaintiffs might have brought an action of trover against the defendant: and it makes no difference, as it appears to us, that Stevens concurred in or directed the sale; for, upon the events that have since happened, Stevens must be considered to have been a perfect stranger, acting without any authority in law, and liable to have been joined in the action with the present defendant. If, then, the assignees might have maintained an action of trover, they may, according to a well known class of cases, waive the tort and bring an action for money had and received, such waiver being a benefit to the defendant, as it limits the damages to the amount of the proceeds of the tortious sale. This disposes of the two first sums mentioned in the case, which were received as part of the proceeds of the sale of the lease.

As to the 10*l.*,
 6*l.* 10*s.*, and
 11*l.* 18*s.*

As to the remaining sums, two of which appear to be rent for the bankrupt's houses, which were received by the hands of the defendant; and the third, a sum of money due to the bankrupt upon an agreement relating to a party-wall, which also was received by the defendant from the party who owed it to the bankrupt: those sums appear to be strictly and literally money received by the defendant to the use of the assignees after the act of bankruptcy committed and notice of such act. And we can see no alteration in the law of the case because Stevens assented to such payments being made; for, Stevens was not assignee de jure, but a mere stranger in interest, without any authority whatever to give his consent. Upon the whole, therefore, we think judgment must be given for the plaintiffs for the several sums mentioned in the case.

Judgment for the plaintiffs.

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BOWER v. HILL and Another.

Tuesday,
Nov. 24th.

CASE for the obstruction of the plaintiff's right of way. In the first count of the declaration, the right claimed was a public one: in the second, the plaintiff alleged that he was possessed of a certain close of land with the appurtenances, situate in the county of Warwick, and, by reason thereof, during all the time aforesaid, ought to have had, and still of right ought to have a certain way from the said close of the plaintiff unto and along a certain stream or watercourse in the county aforesaid, unto and into a certain navigable river called the river Nene, in the county aforesaid, and so back again from the same river unto and along the said stream or watercourse, and from thence unto the said last-mentioned close of the plaintiff, for himself and his servants to go, return, pass, and repossess in boats every year and at all times of the year, at his and their free will and pleasure; and that the defendants wrongfully and injuriously obstructed the way, &c.

A right of way claimed by the plaintiff, by reason of his possession of a close, from the said close unto and along a stream or watercourse into a navigable river, for himself and his servants to pass and repossess in boats, &c., is not supported by evidence of an user of the way by the occupier of an inn and yard held as one entire subject, from which yard the plaintiff's close had recently been severed.

At the first trial, before Taunton, J., at the Northampton Summer Assizes, 1834, the jury negatived the right of way claimed in the first count, and affirmed that claimed in the second count, but added "that the passage was before the building of the bridge and tunnel (the obstruction complained of) by the defendants obstructed by mud, so that the plaintiff could not have the use of it;" whereupon a verdict was, under the direction of the learned judge, entered for the defendants. This verdict was afterwards set aside by the court (see ante, Vol. 1, p. 526), and a new trial granted *on the issue on the second count only*, unless the defendants would consent to a verdict being entered for the plaintiff with nominal damages.

Quære, whether such a claim, even by the occupier of the entire premises, would be sustained by proof that goods were brought to the inn along the watercourse in boats not belonging to the occupier, or navigated by his servants properly so called?

On the second trial, before Littledale, J., at the Northampton Spring Assizes, 1835, it appeared that the close in respect of which the plaintiff claimed the right of way

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had originally formed part of the King's Head yard, and abutted on the stream or watercourse in question; that, whilst the King's Head Inn and yard were in the occupation of the same person as one entire subject, boats and barges for a great many years had been in the habit of going up the stream for various purposes, to carry coals, fish, &c., for the use of the house, corn for the purpose of being deposited in the granaries in the yard, and bricks and other materials for the repair of the house; and that, about five years before the commencement of the action, the occupier of the King's Head Inn had separated that part of the yard in which the inn stood from the part that abutted upon the stream, which latter portion of the premises are now held by the plaintiff. The evidence of user in the manner above stated was brought down to within about sixteen years. The learned judge nonsuited the plaintiff on two grounds—first, that the right claimed was not proved, there being no evidence that any hired servant of the plaintiff had ever taken a boat or barge of the plaintiff's up the stream—secondly, that the right of way disclosed by the evidence belonged to the King's Head Inn and yard, as one entire subject, and not merely to the frontage occupied by the plaintiff.

Adams, Serjeant, in pursuance of leave, in Easter Term last, obtained a rule nisi for a new trial.—He cited *The Bailiffs &c. of Tewkesbury v. Bricknell*, 1 Taunt. 142.

M. D. Hill and *Miller* shewed cause.—There was no evidence whatever of a right appurtenant to that portion of the yard which is in the occupation of the plaintiff; nothing to support the right laid in the declaration. It may be conceded that a plaintiff is not bound to lay his right to the full extent: but he must take care not to lay it differently from the fact. There was no evidence of any user of the way either by the plaintiff or his servants; it

only appeared that the way had been used by tradespeople coming with their different commodities to the King's Head Inn, and to the granaries in the yard, when the whole was occupied together: a right quite distinct from that claimed in the declaration. The extent of the user is evidence of a right only commensurate with the user. This was held in *Ballard v. Dyson*, 1 Taunt. 279. Lawrence, J., there says: "This is a case of prescriptive private way, which presumes a grant: the question then is, what was the grant in this case? That is to be collected from the use; for, it is to be presumed that the use has been according to the grant. A grant of a carriage-way has not always been taken to include a drift-way. In the entries are cases of prescription, not for carriages only, but for cattle also. Co. Ent. 5, 6. Quod permittat ad carriandum et recarriandum blada, fœnum, et finum, ac omnia alia necessaria sua, cum carris et carectis suis, et ad fugandum omnia et omnimoda averia sua. The person who drew that entry certainly did not conclude that a carriage-way included a drift-way for cattle. The use proved here is of a carriage-way: the grant is not shewn, and the extent of it can only be known from the use."

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Adams, Serjeant, in support of his rule.—There was no evidence that the right in question was a right attaching to the King's Head Inn, or confined to the occupier of that house. [*Tindal*, C. J.—All the user proved was shewn to have been by the leave of the occupier of the King's Head Inn: there was no evidence of enjoyment by any one else.] It did not appear, nor does it follow of course, that the right of way was enjoyed in respect of the house: it is far more probable that it was attached to the frontage. At all events, it was a question for the jury. To support the right claimed in the second count, it could not be necessary to shew that the party claiming the right was possessed of a boat, or that he had a hired servant, and so

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used the way. If it were, the persons who brought corn to the granaries in the yard, and coals, fish, and other things for the use of the King's Head, may for this purpose be taken to be the servants of the occupier: or, at least, proof of user of the way by them, would be evidence (though not conclusive evidence) of a right to use it by his servants if he had any. [*Tindal*, C. J.—Take the prescription and the evidence as if there were a grant; and suppose a party claiming the right of way never had any boat, or a servant properly so called, and the grant to be simply for his butcher, baker, &c., to use the way: would that be evidence of a right of way in the party for himself and his servants?] It would be evidence for a jury.

Cur. adv. vult.

TINDAL, C. J.—This was an action upon the case for the obstruction of a right of way claimed by the plaintiff “by reason of his possession of a close of land, from the said close of the plaintiff, unto and along a certain stream or watercourse unto and into a certain public navigable river called the river Nene, and so back again, for himself and his servants to go, return, pass, and repass in boats, every year and at all times of the year, at his and their free will and pleasure.” At the trial, before Littledale, J., he directed a nonsuit to be entered, on two grounds, one of which was, that, upon the evidence, the right was found to belong to the King's Head Inn and yard, as one entire subject, and not to the frontage occupied by the plaintiff; and, as we are satisfied that the nonsuit ought to be entered upon this objection, it becomes unnecessary to advert to any other. The evidence on the trial of user and enjoyment of the right of passage by boats and barges, was referable to the King's Head Inn and yard, and to those premises only. There was no other subject matter to which the user could possibly apply. The proof was, that boats went up to the King's Head yard and back, for various pur-

poses, as occasion required; that coals were carried there; corn, for the purpose of being deposited in the granaries in the yard; bricks, tiles, and other materials for the repair of the house. From such evidence, it might fairly be left to the jury to presume a grant from the owner of the dyke or stream, to the owner of the King's Head Inn and yard, that the occupier of those premises might pass and repass from the same to the river Nene, and back again, by themselves and their servants, in boats and barges, for the more convenient use and enjoyment of the same premises: and, if such grant once existed, there was nothing in the evidence at the trial to shew that it has ever been extinguished or released; but, for anything that appears to the contrary, the occupier of the inn and yard has still the full right to the enjoyment of the easement created by such grant. It appeared, indeed, on the trial, that, within the last five years, the occupier of the King's Head Inn had put up a pair of gates at the bottom of his yard, and had thereby separated the yard from the dyke or stream; during which time the space of ground between the yard and the stream had been in the possession of the plaintiff: and it was upon this evidence that the plaintiff rested his claim to the right of passing along the dyke—contending that the right to the easement attached to each and every part of the land which formed any part of the King's Head yard; and that, as he the plaintiff had the possession of the frontage of the ground adjoining to the dyke or stream, so he had the right of passage which was the subject of the grant. We think, however, such a construction of the grant would lead to very unreasonable consequences. The grant itself, if presumed to have ever existed, is still in full force. Nothing has been done by the grantee to release it. There is only a temporary discontinuance of the enjoyment, or, at most, a temporary suspension of the right, not any extinguishment of it. The occupier of the King's Head Inn and yard may re-

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sume the user at any time, by taking any part of the frontage into his own possession, so as to have access to the dyke; and the consequence would be, if the plaintiff were held to be entitled to the right of passage, that two different persons would be entitled to use it for themselves and their servants with boats and barges, or, indeed, as many different persons as possessed any share of the frontage. This would be an unreasonable construction against the grantor, who may have been contented to grant the right to the occupier of the King's Head Inn and yard, from his knowledge of the degree of user which would follow from the grant when so limited. Independently, however, of this consideration, we think, upon the broad ground, that, if this grant were produced in evidence, the plaintiff could not bring himself within the description of the grantee, he not being the occupier of the King's Head Inn and yard, there was no evidence whatever for the jury in support of his claim, and consequently that the nonsuit is right.

*Tuesday,
June 7th,
1836.*

Rule discharged.

The 64th rule of Hilary Term, 2 Will. 4, applies only to cases where a new trial is granted upon the whole record.

On the trial of a right of way, in one count claimed as a public, and in another as a private way, a general verdict was found for the defendants.

The court afterwards directed a new trial, expressly by the rule confining it to the right claimed in the second count. In the rule no mention was made of costs, nor any reservation of the defendants' verdict on the first count:—Held, that the defendants were nevertheless entitled to the costs of the issues found for them on the first trial and not in contest on the second, they having succeeded on such second trial.

On the taxation of costs, the defendants claimed to be entitled to the entire costs of both trials, and of the motions. It was objected, on the part of the plaintiff, that, inasmuch as the rule directing the second trial was silent as to costs, the defendants, though successful on the second trial, were, by the rule of Hilary Term, 2 Will. 4, s. 64, deprived of the costs of the first. It was contended, on the other hand, that the case did not fall within the rule above mentioned, the plaintiff not having in fact succeeded in obtaining a new trial generally, but

only a new trial upon one issue, upon which issue he was nonsuited on the second trial.

The prothonotary having allowed the defendants the costs of the issues that were found for them on the first trial, and upon which the plaintiff failed to obtain a new trial, and also their costs of opposing the first rule; and disallowed the costs of the issue on the second count, upon which the plaintiff succeeded in obtaining a new trial—

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Adams, Serjeant, on a former day, obtained a rule nisi for a review of the taxation. He submitted, upon the construction of the rule of Hilary Term, that the defendants were entitled only to the costs of the second trial.

M. D. Hill shewed cause.—At the first trial, the public right claimed in the first count of the declaration was negatived by the finding of the jury. The new trial was granted only upon the private right claimed in the second count. The court never intended, nor had they under the circumstances the power, to deprive the defendants of the verdict they had obtained upon the other issue. The defendants are clearly entitled to the costs of the issue upon which they succeeded at the first trial, and the finding upon which was not questioned by the court on granting the rule for the new trial. The rule of Hilary Term, 2 Will. 4, therefore, has no bearing whatever upon the case.

Adams, Serjeant, in support of his rule.—The language of the 64th rule is plain and intelligible, and the interests of justice will be best consulted by a rigid adherence to it. [*Tindal*, C. J.—It certainly was not the intention of the court to deprive the defendants of their verdict upon the first count.] Whatever the intention of the court might have been, the rule for a new trial contains no intimation of such an intention as is now suggested: and

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it would be impossible to restore the plaintiff to the situation he was in at the time the rule was made absolute. Had he supposed that he would be liable to any of the costs of the first trial, possibly he might have declined to go down again. There is no verdict and judgment for the defendants on the first trial remaining upon the record. The learned Serjeant referred to *Newberry v. Colvin*, 2 Dowl. 415, and *Goodburne v. Bowman*, 3 M. & Scott, 69, 9 Bing. 667, 2 Dowl. 206.

TINDAL, C. J.—The 64th rule of Hilary Term, 2 Will. 4, does not at all apply to this case. This is an application to our discretion. It was clearly and palpably an oversight on our part to pronounce the rule in such a form as would have the effect of depriving the defendants of a verdict that, in the mode in which the cause was sent down again, they could not by possibility obtain upon the second trial. It was virtually and substantially the intention of the court that the verdict should stand except as to the second count. A word of suggestion at the time would have caused us to put the matter beyond question. The rule referred to only applies to the case of a new trial upon the whole record—meaning, where the verdict *may be* the other way on the second trial. This could not have been the case here.

The rest of the court concurring—

Rule discharged, without costs.

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PONTET v. THE BASINGSTOKE CANAL COMPANY.

Thursday,
Nov. 25th.

THIS was an action brought to recover arrears (since 1824) of interest due upon certain bonds or deeds-poll given by the company in the year 1793, 1795, and 1797, to the plaintiff's testator, conditioned for the payment of money borrowed by them under the authority of the 18 Geo. 3, c. lxxv. The defendants pleaded that the deeds-poll declared on were made at a meeting of proprietors not duly convened; that the assets of the company were insufficient to pay the plaintiff without giving him a priority not warranted by the act of parliament by which they were incorporated; and also, as to a portion of the arrears, the statute of limitations.

By a canal act, it was provided that the directors should keep books, and that the proprietors, land-owners, and others interested in the navigation, should be at liberty to inspect the company's books:—Held, that a bond-creditor was entitled to such inspection, to enable him to meet the defence intended to be set up by the company in an action upon the bond.

Barstow, for the plaintiff, obtained a rule calling upon the defendants to shew cause why they should not permit the plaintiff to inspect the books of the company, upon an affidavit that such inspection was necessary to enable him to proceed safely to trial. He referred to a clause of the act which requires the company to keep books, and provides that proprietors, land-owners, and others interested in the said navigation, should be at liberty to have recourse to and inspect the same, and take copies thereof, at their own expense.

Wilde, Serjeant, and *Erle*, shewed cause.—The plaintiff has no right to the inspection prayed. He is not a shareholder or proprietor, and therefore not a party interested in the navigation. *Ratcliffe v. Bleasby*, 10 Moore, 523, 3 Bing. 148, may be taken to be a leading case upon this subject: it underwent very great consideration, and the court held “that they would not, at the instance of a plaintiff, compel a defendant to produce an instrument which was in his hands, and to which the plaintiff

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was neither an instrumentary party nor a party in interest." In *Rowe v. Howden*, 1 M. & P. 334, 4 Bing. 539, in an action by the owners of a ship against a broker employed by them to procure a cargo, the court refused to order the latter to allow the former to inspect or take a copy of a letter received by him from a correspondent abroad, as far as it related to the plaintiffs' ships, although he acted as such broker at the time. So, in *Rundle v. Beaumont*, 1 M. & P. 396, 4 Bing. 537, in an action for freight and demurrage, by ship-owners against the charterer, the court refused to grant the latter an inspection of the log-book kept during the voyage. In *The Imperial Gas Company v. Clarke*, 4 M. & P. 727, 7 Bing. 95, the defendants were sued as directors of an incorporated company, for mismanagement of the company's affairs: and the court refused to allow them to inspect the books kept by the company during the period of their directorship—Tindal, C. J., saying: "The general rule is, that one side shall not be permitted to get at the evidence of the other side. There are, however, exceptions to that rule. In the case of corporations, parties have been allowed to inspect the *corporate books* and bye-laws, *on the ground that they have an interest in them*." In *Stevens v. The Mayor of Berwick-upon-Tweed*, 4 Dowl. 277, it was held that the circumstance of an attorney being a burgess does not entitle him, in an action against the corporation for costs, to inspect the corporate books in order to prove his retainer, his claim having nothing to do with the affairs of the corporation. Little-dale, J., says: "Such applications as the present are granted only in those cases where the opposite party stands in the situation of a trustee for both parties. That is not the case here. It is true that the plaintiff has a right to inspect the books where his rights as a burgess are affected: but here his rights as a burgess do not come in question; and the mere accidental circumstance of his

being a burgess cannot give him a right to inspect the corporation books for the purpose of sustaining his private claims." Upon these authorities it is clear that this case does not fall within the general rule by which the practice on applications of this sort is regulated: and the provision in the act of parliament does not extend to creditors.

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Barstow, in support of his rule, insisted that the books kept by the company in obedience to the directions of the act, were held by the company as trustees for their bond-creditors, as well as proprietors, the former being as much "interested in the navigation" as the latter.

TINDAL, C. J.—The only question here is, as it seems to me, whether the inspection prayed is to be granted by us, or whether the plaintiff is to be driven to a court of equity. The rule seems to be, that, where the court of equity would interfere as matter of course, it is usual for the court of law to grant an inspection. It appears to me, however, that this case falls within the equitable construction of the act of parliament. The creditors of the navigation are clearly to a great extent interested in it. Without, therefore, in any degree extending the practice on this subject, I think we may on that ground make the rule absolute.

The rest of the court concurring—

Rule absolute.

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In an action of slander, a plea stating that the words were spoken in the course of a confidential communication to a person who had made inquiries respecting the solvency of the plaintiff, and that at the time of speaking the words the defendant believed them to be true—is bad on demurrer: it should either expressly negative malice, or state the communication to have been made honestly and bona fide, which would probably amount to an implied denial of malice.

A plea negating the special damage alleged in the declaration, in slander for words actionable per se, is bad on demurrer.

SMITH v. THOMAS.

THIS was an action upon the case for slander. The first count of the declaration (after the common inducement) stated, that, before and at the time of the committing of the grievances by the defendant as thereafter mentioned, and from thence hitherto, the plaintiff had been and still was a draper, haberdasher, and laceman, and had always exercised and carried on, and still did exercise and carry on the trade and business of a draper, haberdasher, and laceman, with integrity, honesty, and propriety of conduct; that the plaintiff had not been, nor, until the time of the committing of the several grievances by the defendant as thereafter mentioned, had been suspected to have been in embarrassed or insolvent circumstances in the way of his said trade or business, or imprisoned, or a person unfit to be credited in the way of his said trade or business, as thereafter stated to have been charged upon and imputed to him by the defendant, or guilty of any offences or misconduct whatever: by means of which said premises the plaintiff, before the committing of the several grievances by the defendant as thereafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours and other subjects of this realm to whom he was in any wise known, and had also thereby acquired and was then thereby daily and honestly acquiring great gains and profits in his said trade and business, to the comfortable support of himself and his family, and the great increase of his riches: yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and maliciously intending to injure the plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours and other subjects of this realm, and to cause it to be

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suspected and believed by his the plaintiff's neighbours and other subjects of this realm, that the plaintiff had been in embarrassed circumstances in the way of his said trade or business, and a person unfit to be credited in the way of his said trade and business, and to vex, harass, impoverish, and wholly ruin the plaintiff in his said trade and business, theretofore, to wit, on the 10th October, 1834, in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning him in the way of his said trade and business, in the presence and hearing of *divers* subjects of this realm, then, in the presence and hearing of the said subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in the way of his trade and business, the false, scandalous, malicious, and defamatory words following, that is to say—"I do not do business with him (meaning the said plaintiff, in the way of his said trade and business), nor will I, as he is a queer character, and has been deeply involved in debt, and in several prisons"—thereby meaning and being by the last-mentioned subjects then understood to mean to insinuate that the plaintiff had been in embarrassed circumstances, and was unfit to be credited in the way of his said trade and business. The second count concluded by alleging as special damage, by reason of the committing of the grievances by the defendant, the refusal of several persons (naming them) to deal with the plaintiff.

Second count.

The defendant pleaded (secondly), that, before and at the time of speaking and publishing the said several words and each of them in the declaration mentioned, the defendant was a linen merchant, and the trade and business of a linen merchant during all that time exercised and carried on; that John Wreford, in the declaration mentioned, was also theretofore, and during all the time before mentioned, a hosier and haberdasher, and the trade and business of a hosier and haberdasher during all that time exercised and

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carried on; that the said John Wreford, being then desirous of inquiring and learning, and having occasion to inquire and learn, in the way of his trade and business of a hosier and haberdasher aforesaid, into the solvency and state of affairs of the plaintiff, and believing that the defendant could then afford him the said John Wreford information as to such solvency and state of affairs, did then, to wit on, &c., send one William Wreford, the nephew of the said John Wreford, and his agent for that purpose, to inquire into and learn from the defendant the solvency and state of affairs of the plaintiff; and thereupon the defendant, being inquired of as to the solvency and state of affairs of the plaintiff by the said William Wreford as such agent as aforesaid of the said John Wreford, in the way of the said trade and business so carried on by the said John Wreford, did, in answer to such inquiry, speak and publish to the said William Wreford as such agent the said several words in the declaration mentioned, as he lawfully might for the cause aforesaid, the same then being a confidential communication by the defendant to the said William Wreford as such agent, *he the defendant at the time of so speaking and publishing the said words as aforesaid firmly believing the same and each of them to be true:* which said speaking and publishing were the same speaking and publishing by the defendant of the said words as in the declaration mentioned, and whereof the plaintiff had above thereof complained against him—concluding with a verification.

Third plea,
denying special
damage.

A further plea (the third) was pleaded in denial of the existence of the special damage alleged in the second count of the declaration.

Demurrer to the
second plea.

To the second plea the plaintiff demurred specially, assigning for causes—that the matters pleaded were in bar, if the words were spoken maliciously, and that therefore the plea, if it admitted malice, was bad, and, if it denied the malice, was argumentative and amounted to the gene-

ral issue, and, being a denial, should have concluded to the country; that the plea did not sufficiently deny the grievances, or confess and avoid them; that the matters pleaded did not avoid the malice; that the plea would take away from the jury the consideration of the question of malice, although the malice was either the gist or at least a substantive part of the cause of action; that the plea amounted to the plea of not guilty; that it did not confess the meaning with which the words were charged in the declaration to have been spoken; that the plea, although it professed to answer the whole declaration, only justified a speaking and publishing to one person, although the defendant was charged with speaking and publishing the words in the presence and hearing of divers; that the plea shewed no reason or necessity for publishing the words in the presence of divers, when the occasion, as stated in the plea, only required the defendant to speak the words to one person alone; that the plea ought to have shewn some reason why the defendant should believe the words to be true, and also that it ought to have shewn what occasion John Wreford had to inquire into the solvency and state of affairs of the plaintiff, that the court might see whether it was a lawful occasion, and that at all events the plea ought to have stated the occasion to have been lawful or proper, and that the defendant had notice of it; that the plea was substantially bad, because a party who does not appear by the plea to be the relation or friend, or to have any connexion with the person who applies to him, or to have had any grounds for his belief, is not justified in making false assertions injurious to a tradesman's credit; and that the plea was in other respects informal, uncertain, and insufficient.

The plaintiff also demurred to the third plea, assigning for causes that the special damage was not the gist of the action, nor traversable; that the defendant could not plead a plea to the damage alone; the damage not being

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by itself a cause of action or divisible from the rest of the grievances; that the plea did not sufficiently point out what it was to which it was intended to be pleaded, and that it was in other respects uncertain, informal, and insufficient.

Talfourd, Serjeant, in support of the demurrer.—The second plea is clearly bad; it amounts to the general issue (Com. Dig. *Pleader*, E. 14.), and neither denies nor confesses and avoids the matters charged in the declaration. [*Tindal*, C. J.—The second plea contains no denial of the speaking of the words, or of their falsehood.] It amounts to a mere argumentative denial of malice. It was necessary for the plaintiff to prove malice—*Smith v. Spooner*, 3 Taunt. 246. The absence of malice, being matter of defence, was put in issue by not guilty, as are payment, accord and satisfaction, release, &c. In *M'Pherson v. Daniels*, 10 B. & C. 263, 5 M. & R. 251, in an action of slander for words spoken of the plaintiff in his trade, importing a direct assertion made by the defendant that the plaintiff was insolvent, a plea that one T. W. spoke and published to the defendant the same words, and that the defendant at the time of speaking and publishing them declared that he had heard and been told the same from and by the said T. W., was held bad, on demurrer. *Littledale, J.*, there says: "The declaration, which contains a technical statement of the facts necessary to support the action, alleges that the defendant falsely and maliciously published the slander to the plaintiff's damage. In order to maintain such an action, there must be malice in the defendant and a damage to the plaintiff, and the words must be untrue. Where words falsely and maliciously spoken, as in this case, are actionable in themselves, the law *prima facie* presumes a consequent damage, without proof. In other cases, actual damage must be proved. To constitute a good defence,

therefore, to such an action, where the publication of the slander is not intended to be denied, the defendant must negative the charge of malice (which in its legal sense denotes a wrongful act done intentionally without just cause or excuse), or shew that the plaintiff is not entitled to recover damages. *It is competent to a defendant, upon the general issue, to shew that the words were not spoken maliciously*; by proving that they were spoken on an occasion or under circumstances which the law, on grounds of public policy, allows, as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. But, if the defendant relies upon the truth as an answer to the action, he must plead that matter specially; because the truth is an answer to the action, not because it negatives the charge of malice (for, a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shews that the plaintiff is not entitled to recover damages." In *Carr v. Hinchliffe*, 4 B. & C. 547, 7 D. & R. 42, Bayley, J., says: "There are two instances in which a defendant has the option of giving his defence in evidence under the general issue, or of putting it on the record. One of those is, where the plaintiff's right of action is confessed and avoided by matter ex post facto; ex gr. by a plea of payment, as in *Brown v. Cornish*, 1 Ld. Raym. 217, and *Vanhatten v. Morse*, 2 Ld. Raym. 787; or accord and satisfaction, as in *Paramore v. Johnson*, 1 Ld. Raym. 566, where the reason is assigned, viz. that it gives color to the plaintiff. The other instance is, where the plea does not deny the declaration, but answers it by matter of law: thus, in *Hussey v. Jacob*, 1 Ld. Raym. 87, which was an action against the acceptor of a bill of exchange, the defendant pleaded that it was given for money lost at play, and therefore void by the 16 Car. 2, c. 7; plaintiff demurred, and one objection taken was that the plea amounted to the general issue; but it was held, that,

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the plea not consisting of bare matter of fact, but being intermixed with matter of law, the defendant might plead it specially, for otherwise he would be obliged to commit a point of law to the jury." Here, the plea does not confess and avoid the cause of action alleged in the declaration, nor does it answer it by matter of law. The new rules have effected no alteration in this respect (a). [*Tindal*, C. J.—Doubt is expressed in some of the cases as to whether a justification of this description ought not to be pleaded specially—see *Curry v. Walter*, 1 B. & P. 525, and the cases there cited. It is, at all events, a fastidious objection; and before we allow it to prevail we ought to see very clearly that it is well founded.]—Then, the plea, professing to be an answer to the whole declaration, in fact answers a part of it only; the declaration charges the defendant with having spoken the obnoxious words in the presence and hearing of *divers* persons, and the plea justifies the speaking them to *one* person only. The plea is therefore insufficient on that ground.—With respect to the third plea—to the special damage: that clearly is bad. The words being actionable in themselves, it was not competent to the defendant to plead to that which is mere matter of consequence, of aggravation.

Storks, Serjeant, contra.—The law implies malice, where the words spoken are in themselves slanderous: the allegation that they were *maliciously* spoken is immaterial, and may be rejected. The matter underwent considerable discussion in *Bromage v. Prosser*, 4 B. & C. 247,

(a) "In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, *of speaking them maliciously*, and in the sense imputed, and with refer-

ence to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged." R. Hilary Term, 4 Will. 4, Case, IV.

6 D. & R. 296, where Bayley, J., in delivering the judgment of the court, says: "In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. This is so laid down in Styles, 392, and was adjudged upon error in *Mercer v. Sparks*, Owen, 51, Noy, 35. The objection there was, that the words were not charged to have been spoken maliciously; but the court answered that the words were themselves malicious and slanderous, and therefore the judgment was affirmed. Though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice." *Drewe v. Coulton*, 1 East, 563, n., is an authority to the same effect. That was an action against a returning officer for refusing a vote at an election of members to serve in parliament, in which it was held to be necessary to aver and to prove malice: but the court inclined to think that charging that the defendant, knowing &c., and *wrongfully* intending to deprive the plaintiff &c., hindered him from giving his vote &c., was a sufficient allegation of malice. And in *Milward v. Sergeant*, 1 East, 567, n., Lord Mansfield and the court of King's Bench refused to hear any argument unless a distinction could be shewn between that case and the case of *Ashby v. White*, saying that the question had already been determined by the House of Lords (2 Lud. 245). Garrow for the defendant, said he thought that there was a very material distinction between the two cases, and that he meant to argue it on the ground of that distinction; which was that the declaration did allege the act done to have been malicious. But Ashhurst, J., then said that the distinction was not well founded, for it was laid to be "*wrongfully* intending to injure" &c., which was the same as "*maliciously*" &c., and therefore the plaintiff recovered.

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[*Tindal*, C. J.—“Falsely” (*b*) is enough, if the words are in themselves slanderous.]—Assuming that the matter here pleaded might be given in evidence under the general issue, it does not follow that it may not also be put upon the record—*Carr v. Hinchliffe*. In 1 Wms. Saund. 131, n. (1), it is said: “When the defendant admits the publishing or speaking of the libel or words as stated, but justifies so doing because they are true, he must plead this matter specially; for, he will not be permitted to give it in evidence upon the general issue. But, where the defence is that the libel or words were published or spoken, not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this matter may be given in evidence under the general issue, because it proves that the defendant is not guilty of the malicious slander charged in the declaration.” And, after citing instances, the learned editor proceeds—“or the defendant may plead these matters, but it seems more usual now to give them in evidence under the general issue.”—It is said that the second plea is also bad, inasmuch as it professes to answer the whole declaration, and justifies in fact only a speaking of the words in the presence of *one* person. There is nothing in this objection. In a note to *Crafte v. Boite*, 1 Wms. Saund. 242, it is said: “The declaration must shew a publication of the slander, otherwise the action does not lie; and therefore it is averred in this declaration that the

(*b*) “The declaration must also shew a malicious intent in the defendant; but it is not necessary to use the word ‘maliciously,’ for the word ‘falsely’ alone has been held to be sufficiently expressive of a malicious intent—*Moor*, 459, *Owen*, 51, *Mercer v. Sparks*, S. C. *Noy*, 35. Indeed, in *Styles*, 392, *Anon.*, *Rolle*, C. J.,

was of opinion that in a declaration it is not necessary to use either the words *falsely* or *maliciously*, but in an indictment or information it is. I suppose he meant, that, after *verdict*, the omission of them would be helped in a declaration.” 1 Wms. Saund. 242 *a*, n. (2).

defendant spoke the words in the presence and hearing of several persons. But these words, though generally used, are not absolutely necessary: any others that denote a publication are sufficient; as, that the defendant spoke the words 'palam' or 'publice.' Cro. Eliz. 861, *Taylor v. How*." In *Monprivatt v. Smith*, 2 Camp. 175, in trespass for breaking and entering a house and staying therein *three weeks*, the defendant pleaded a justification as to breaking and entering and staying in the house *twenty-four hours*; and it was held that the plea covered the whole declaration. And Lord Ellenborough said, that, "if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment." So, in *Taylor v. Cole*, 3 T. R. 292, 1 H. Bl. 555, in trespass for breaking and entering the plaintiff's house and expelling him therefrom, it was held that the expulsion was merely aggravation, and that a justification as to breaking and entering will cover the whole declaration. Here, the plaintiff ought to have new assigned, if he meant to rely upon any other occasion of speaking than that justified by the plea; for, there is no distinction in this respect between trespass and case.—With respect to the third plea, it cannot be contended that the special damage is the gist of the action, nor can any authority in support of such a plea be cited. [*Tindal*, C. J.—The third plea is pleaded as a bar to the action: there is no such thing as a plea to the special damage.]

Talfourd, Serjeant, in reply.—Wherever words spoken impute crime to the plaintiff, or are injurious to him in his trade or profession, the law will imply malice: malice is the gist of the action. In *Pitt v. Donovan*, 1 M. & S. 639, in an action for slander of title conveyed in a letter to a person about to purchase the estate of the plaintiff, imputing insanity to Y., from whom the plaintiff purchased it, and that the title would therefore be disputed, per quod the

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person refused to complete the purchase : it was held that the defendant, who had married the sister of Y., who was heir at law to her brother in the event of his dying without issue, was not to be considered as a mere stranger ; and that the question for the jury was, not whether they were satisfied as men of good sense and good understanding that Y. was insane, or that the defendant entertained a persuasion that he was insane, upon such grounds as would have persuaded a man of sound sense and knowledge of business ; but whether he acted bonâ fide in the communication which he made, believing it to be true, as he judged according to his own understanding, and under such impressions as his situation and character were likely to beget.

Cur adv. vulg.

TINDAL, C. J., now delivered the judgment of the court : The argument in this case has turned principally on the special demurrer to the second plea ; for, as to the third plea, which is pleaded, not to the action, but to the special damage only, we held it to be insufficient, as the argument was proceeding before us. The allegation of special damage in a declaration for slander is intended only as notice to the defendant, in order to prevent his being taken by surprise at the trial. Where the words are actionable in themselves, it is not the gist of the action, but a consequence only of the right of action. If the plaintiff proves his special damage, he may recover it ; if he fails in proving it, he may still resort to and recover his general damages. A traverse, therefore, of such an allegation is immaterial and improper, as a finding upon it either way will have no effect as to the right to the verdict.

With respect to the second plea—it avers in substance that the words complained of in the declaration were spoken in the course of a confidential communication between the defendant and a person who had made inquiries respecting the solvency and state of affairs of the plaintiff, whom the inquirer was then about to trust in the course of

his trade and business: and it further avers, that, at the time of his speaking the words in question, he, the defendant, firmly believed the same and each of them to be true. To this plea the plaintiff has demurred, and has assigned several causes of special demurrer. The two points, however, which have been relied on in argument before us are these—first, that the plea amounts to the general issue, and is on that account bad—secondly, that the defendant has not, by the allegations in his plea, sufficiently negatived that the speaking of the words was accompanied with malice in fact, so as to constitute a legal answer to the action.

It is unnecessary to give any opinion on the first objection, because, upon the ground of the second, we think the plea is insufficient in law. The ground of defence intended to be set up by the defendant is, that the words were spoken on an occasion in which the exigencies of society demand that there should be the unlimited right to make inquiry on the one hand, and the unlimited freedom to communicate on the other; such communication being made without any malice against the plaintiff. There can be no doubt, that, where such an occasion occurs, and there is in the making of the communication the absence of express malice, or malice in fact, the law holds the communication to be innocent, and to give no right of action to the plaintiff. In order, however, to constitute such a defence in any case, both circumstances must be found to concur: and, after the just occasion for the communication has appeared in proof, the issue must depend on the existence or absence of express malice against the plaintiff. The question, therefore, upon the present plea is, whether it states with sufficient certainty both the circumstances above mentioned. So far as relates to the occasion of publishing the libel, the statement in the plea appears to us to be free from any sound objection. The publication is alleged to have taken place in the course of a confiden-

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tial communication between one tradesman and another as to the solvency of a third person whom the inquirer was about to trust. If such communications are not protected by the law from the danger of vexatious litigation in cases where they turn out to be incorrect in fact, the stability of men engaged in trade and commerce would be exposed to the greatest hazard; for, no man would answer an inquiry as to the solvency of another. But then comes the question as to the other fact which is essential to complete the defence—was the communication made without any malice against the plaintiff? And we think the plea is defective in respect to its allegation on this point. The plea neither expressly denies malice, nor states the publication to have been made honestly or *bonâ fide*, which might have amounted to an implied denial of malice. All that it alleges is, that the defendant firmly believed the words spoken to be true. Now, this is the denial of *one* ground upon which malice in fact might be presumed against the plaintiff, but of one only. If the plaintiff could shew that the defendant had uttered the words, and had not believed them to be true at the time he uttered them, it would undoubtedly be conclusive evidence of the defendant's malice against the plaintiff. The allegation therefore in the plea, that the defendant did believe the words to be true, negatives undoubtedly that single ground of malice, but no more. The communication, however, may have been malicious on various other grounds. Direct malice against the plaintiff may have gone far in producing the defendant's belief. Consistently with the allegation in his plea, the defendant may have sought out the occasion of hearing the slander of the plaintiff, and, again, the subsequent occasion of making the communication. These and other grounds of a malicious speaking of the words would be excluded by an express denial of malice, or the allegation that the words were spoken honestly and *bonâ fide*. But we think the absence of malice in fact against the

plaintiff does not appear with sufficient certainty upon the face of this plea: and, for want of the express or implied denial of it, we hold the plea to be bad, and that there must be judgment for the plaintiff on the second and third pleas.

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Judgment for the plaintiff.

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Wednesday,
Nov. 25th.

THIS was an action of assumpsit on a policy of insurance, whereby the plaintiffs caused themselves to be insured, lost or not lost, at and from Groningen to Rochester, *including risk of craft to and from the ship*, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the *Petronella Catherina*, beginning the adventure upon the said goods and merchandizes from the loading thereof on board the said ship, and so should continue until the said ship, with all her tackle, apparel, ordnance, munition, artillery, boat, and other furniture, and goods and merchandizes whatsoever, should be arrived at Rochester, and the goods and merchandizes should be there discharged and safely landed; the said ship, &c., goods and merchandizes, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were valued at 750*l.* on linseed cakes, free of particular average *unless the ship should be stranded*: touching the adventures and perils which the assurers were contented to bear and did take upon themselves in that voyage, they were of the seas, &c., and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandizes and ship, &c., or any part thereof: and by a certain memorandum thereunder written, corn, fish, salt,

Goods were insured upon a voyage from G. to R. "including risk of craft to and from the ship," the risk to continue "until they should be discharged and safely landed," and "free of particular average unless the ship should be stranded." Arrived at R., the goods were put on board a lighter for the purpose of being landed. The lighter was stranded, and an average loss was in consequence sustained:—Held, that this loss was not covered by the policy.

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fruit, flour, and seed, were warranted free from average unless general or the ship should be stranded; sugar, tobacco, hemp, flax, hides, and skins, were warranted free from average under 5*l.* per cent.; and all other goods, also the ship and freight, were warranted free from average under 3*l.* per cent., unless general, or the ship should be stranded: And by a certain other memorandum thereunder written, it was declared that the said insurance was on linseed cakes, valued at 750*l.* The count contained the usual averments of payment of premium—mutual promises—and the loading and continuance of the goods on board the vessel during the voyage; and then proceeded to state that the said ship or vessel, with the said goods and merchandize on board thereof, departed and set sail from Groningen on her voyage towards Rochester; that, after her departure from Groningen, and after her arrival at the port of Rochester, and before the said linseed cakes were safely landed, to wit, on the 29th November, 1834, the said linseed cakes were, for the purpose of safely landing the same, necessarily and unavoidably taken by the master of the said ship or vessel from and out of the same, and were placed by him in and on board of a certain lighter for the purpose of safely landing the same, according to the custom of the port of Rochester, and the tenor and effect, true intent and meaning of the said policy of insurance; which said lighter, so having the said linseed cakes in and on board thereof, was, whilst proceeding on the voyage for the purpose of safely landing the same, by and through the force and violence of the winds and waves, and by the perils and dangers of the river Medway, and of the waters thereof, forced, driven, and cast upon and against the starlings of a certain bridge over and across the said river, and thereby became and was strained, bulged, disjointed, broke, and otherwise damaged, insomuch that by means thereof the said lighter was wholly disabled from proceeding on the said voyage;

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and afterwards, on the 30th November, 1834, by and through the force and violence of the winds and waves, and by the perils and dangers of the river Medway, and of the waters thereof, was stranded, and was forced down and cast upon and against certain shoals, and there sunk, and continued under water for a long space of time, with the said linseed cakes on board thereof, whereby the said linseed cakes became and were greatly wasted, destroyed, damaged, and spoiled; whereby the plaintiffs sustained an average damage or loss on the said linseed cakes to a larger amount than 5*l.* per cent. on all the money insured thereon, to wit, to the amount of 70*l.* by the hundred, whereby the defendant then became liable to pay to the plaintiffs a large sum of money, to wit, the sum of 185*l.*, being the defendant's proportion of the said average loss for and in respect of the sum by him insured as aforesaid; of all of which premises the defendant afterwards, to wit, on &c., had notice; and thereupon the defendant afterwards, to wit on &c., in consideration of the premises, promised the plaintiffs to pay them the said sum of money on request; yet the defendant had not, although often requested so to do, paid the same sum of money, or any part thereof: to the damage of the plaintiffs of 200*l.*

To this count the defendant demurred specially, assigning for causes—that the plaintiffs had in their said count stated a particular average loss only on the goods in the policy of insurance in that count mentioned, without averring that the said ship in that count mentioned was stranded, whereas it appeared by the policy that the said goods in the policy mentioned and thereby insured were free of particular average, *unless the ship were stranded*; that the plaintiffs had not averred the performance of the condition precedent mentioned in the said policy in the first count of the declaration; also that the plaintiffs had not stated in the first count of the declaration any such

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loss of the said goods in the policy mentioned as by the terms of the policy the defendant was liable for.

The plaintiffs joined in demurrer.

Maule, in support of the demurrer.—The question is, whether the stranding of a lighter is a stranding of the ship within the meaning of this policy—whether the goods, whilst on board the lighter, are within the warranty to which the exception “unless *the ship* should be stranded” applies. The policy includes “risk of craft to and from the ship;” therefore the parties had their attention called to the distinction between risk of craft and risk to the ship herself; and if they had intended that the warranty should embrace a stranding of a lighter, they would have so expressed it. The stranding is a condition, and is to be construed strictly. If such a stranding as this were held to be the happening of the event upon which the underwriter’s liability to particular average was to arise, the consequence would be that the stranding of a single lighter would fix them with particular average arising during any part of the voyage insured.

W. H. Watson, contra.—The exception contained in the warranty in this policy does not apply to the risk of craft; and the clause freeing the goods in question from particular average unless the *ship* should be stranded, applies equally to the stranding of a barge or lighter. The policy describes the risk as attaching “at and from Groningen to Rochester, including risk of craft to and from the ship.” In *Stewart v. Bell*, 5 B. & A. 238, where, on an insurance on goods from London to Jamaica generally, the goods insured were destined to a particular plantation on that island, and the usual course in such a case was for the ship to proceed to an adjoining port, and there tranship her cargo into shallops; it was held that the underwriters were liable for a loss which occurred after such

transhipment. So, in *Hurry v. The Royal Exchange Assurance Company*, 2 B. & P. 430, 3 Esp. 289, upon an insurance on goods from A. to B. "until they should be there discharged and safely landed:" on their arrival at B., the merchant to whom the goods belonged employed and paid a public lighter to land them, and the goods being damaged in the lighter, without negligence, the underwriters were held liable for the loss. And in *Rucker v. The London Assurance Company*, 1 Marsh. Ins. 253, 2 B. & P. 432, n., 3 Esp. 290, goods put into a public lighter for the purpose of being landed, were held to be protected by usage under a general policy. But, assuming that the risk by craft is covered by the exception, the stranding of a lighter is within the meaning of this policy a stranding of the ship. The reason given by Lord Kenyon, in *Nesbitt v. Lushington*, 4 T. R. 783, for confining the liability of the underwriter to particular average to cases of stranding, applies with equal force to the stranding of the ship as to the stranding of a lighter. He says: "The articles enumerated are of a perishable nature: as it might be difficult to ascertain whether their being damaged arose from any accident, or from the nature of the articles themselves, this memorandum is inserted in all policies, to prevent disputes; and by it the underwriters expressly provide that they will not pay any average on these articles, unless it be general or the ship be stranded. When a ship is stranded, then the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though the fact cannot always be ascertained." Suppose the ship to be damaged in the course of the voyage, and the cargo transhipped, and the second ship stranded; would not the underwriters in that case be liable for a particular average? or, suppose the cargo to be transhipped on board two or more other vessels, would not the stranding of one of those vessels let in a particular average, at least as to the goods on board the stranded

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vessel? The "ship" includes the whole bottom conveying the cargo from the commencement of the voyage to its termination. [*Tindal*, C. J.—Is it contended that the mere stranding of a single lighter will let in all partial losses occurring during any part of the voyage insured?] To avail the plaintiff, the argument must undoubtedly be urged to that extent.

Moule, in reply.—All difficulty will be removed by construing the words of the warranty according to their plain and ordinary sense. A lighter must clearly be understood to mean something different from a ship. There is no reason why the warranty should not apply to risk of craft as well as to the risk whilst the goods are on board the ship. If the argument on the other side be well founded, the grounding of a ship's boat while conveying on board a single bale of goods, would affect the whole cargo in the event of a partial loss happening at any subsequent period of the voyage. As well might it be said that the stranding of a cart under similar circumstances would constitute a stranding so as to charge the underwriters with particular average.

[*Car. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court: This action is brought upon a policy of insurance on goods loaded on board the ship *Petronella Catherine*, on a voyage from Groningen to Rochester, "including risk of craft to and from the ship." The risk upon the goods is described in the usual terms, to begin from the loading of the goods and merchandize on board the said ship, and to continue "until the same should be discharged and safely landed;" and in the body of the policy a clause is inserted that the goods should be valued at £500, on linseed cakes, "free of particular average, unless the ship should be stranded." There is also the usual memorandum

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at the foot of the policy. The loss is described in the declaration to have taken place after the ship's arrival at the port of Rochester, and before the linseed cakes were safely landed, by reason of the same having been put into a lighter for the purpose of being safely landed; and the lighter striking against the starlings of Rochester Bridge and being afterwards stranded, in consequence whereof the plaintiffs sustained an average loss upon the linseed cakes to a larger amount than 5*l*. per cent. on the monies insured on the same; and whether, upon this policy, in consequence of the lighter having been stranded, the plaintiffs are entitled to recover the particular average loss, is the question which has been argued before us upon a demurrer to the declaration; and we are all of opinion that the plaintiffs cannot recover for this loss. The words of the warranty in question are general, with one single exception: the assured expressly warrants the linseed cakes "to be free of particular average," with the single exception, "unless the ship be stranded;" and, taking the latter words to be words of condition, and that the policy is opened to cover any particular average loss on the goods if the condition has happened, according to the well established doctrine on this head, it would be enough to say that the condition specified has never taken place; for, the ship has not been stranded, and the warranty remains in full force, that is, a general warranty against liability for an average loss. And we cannot but think, that, if the parties had intended the warranty against particular average loss not to have been a general warranty, but a warranty limited to partial losses happening whilst the goods were on board the ship, they would have so stated it; the more especially because the risk of the underwriters is by the very terms of the policy expressly made to continue until the goods be safely landed. For, as the warranty against particular average loss follows in the same policy, without any express limitation as to its duration, it must, upon the

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ordinary rules of construction, be construed as coextensive with the risk which the underwriters had taken upon themselves; that is, it is a warranty until the goods be safely landed. And again, the parties having before made express mention of risk of craft as well as risk of ship, they would have made the exception wider, by extending it to the stranding of craft as well as the stranding of the ship, if such had been the real intention of the contract. Without, however, entering into the discussion of the particular difficulties which have been stated as likely to arise by adopting the construction contended for by the assured, it seems to us sufficient to observe that it would, if adopted, very much increase the liability of the underwriters. The stranding of a lighter, in the legal technical sense of the word stranding, is an event of very frequent occurrence on a flat shore. The mere taking of the ground, and remaining there a short time, and then getting off again, would be held a stranding. And, if such an occurrence were to have the effect of making the underwriter liable for all the small and trivial damage occasioned to the articles enumerated in the memorandum at the foot of the policy (which is the same warranty in terms as the present), it would involve them in much litigation: if it were to have the larger effect (as contended for in argument by the plaintiff's counsel) of letting in all former partial losses incurred whilst the articles were on board the ship, the consequences would be still more alarming. Upon the whole, we think the partial loss described in the declaration is not covered by the policy, and therefore give judgment for the defendant.

Judgment for the defendant.

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ASSUMPSIT on a contract to pay for goods sold and delivered by bills at certain dates, with security.

The first count of the declaration stated that the plaintiffs, on the 16th October, 1834, put up and exposed to sale divers large quantities of goods, to wit, 50,000 books, 5,000 stereotype plates, and 5,000 copperplates, under and subject to the following conditions of sale, that is to say—“Amounts under 10*l.* to be paid for in ready money; four months' credit for 10*l.*; four and eight months for 20*l.*; four, eight, and twelve months for 50*l.*; four, eight, twelve, and sixteen months for 100*l.* and upwards: to be settled by bills (with security if required) divided according to the above terms, dated November 5th, 1834: imperfections to be applied for within fourteen days after the books are delivered”—as by the said conditions of sale, reference being thereunto had, would, amongst other things, more fully appear; of all which premises the defendant, to wit, on *&c.*, had notice: that thereupon the defendant became the purchaser, according to the said conditions of sale, of divers large quantities of the said goods, to wit, *&c.*, at and for divers prices and sums of money as to the same quantities of goods, respectively then agreed upon between and by the plaintiffs and the defendant respectively, and amounting in the whole to a sum of money exceeding the sum of 100*l.*, to wit, the sum of 261*l.* 4*s.* 2*d.*; and thereupon, in consideration of the premises, and that the plaintiffs, at the request of the defendant, had then promised the defendant to perform and fulfil all things in the said conditions of sale contained on their part to be performed and fulfilled, the defendant then promised the plaintiffs to

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In assumpsit upon a contract of sale of certain books to the defendant under certain special conditions set out in the declaration, the defendant pleaded in bar, that the books were sold to him upon the conditions set out in the declaration, but subject and according to the usage and course of dealing observed amongst book-sellers in London, by which usage and course of dealing, as stated in the plea, a material variation was made in the terms of the contract declared on, concluding with a verification. The plaintiff replied generally, that the defendant of his own wrong, and without the cause by him in his plea alleged, committed the breach of promise in the declaration mentioned, modo et forma, concluding to the country:—Held, on special demurrer, that this replication was informal

and insufficient, even supposing the general replication *de injuria* to be applicable to an action of assumpsit; for, it did not admit the promise and excuse the nonperformance of it, but in effect denied that the promise was ever made.

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perform and fulfil every thing in the said conditions of sale on his part and behalf as such purchaser as aforesaid to be performed and fulfilled: and the plaintiffs in fact said that they did thereupon, to wit, on the 25th November in the year aforesaid, deliver to the defendant, and the defendant then received from them the said several quantities of goods so purchased by the defendant as aforesaid; that fourteen days after such delivery and receipt had long since elapsed, and that imperfections were not applied for in respect of the same goods; or any of them, within such fourteen days; and that, although the plaintiffs thereupon, to wit on the 1st December, 1834, required the defendant to settle with them for the said several quantities of goods so purchased by him, by bills (with security) dictated according to the terms in that behalf of the said conditions of sale, and although the plaintiffs had always hitherto from the time of the said delivery been ready and willing to receive from the defendant bills, with security, divided as aforesaid, for the said sum of money, to wit, for the sum of £261d. 4s. 6d., whereof the defendant then had notice; yet the defendant had disregarded his said promise; and did not nor would when he was so requested by the plaintiffs as aforesaid, or at any other time, settle for the said goods so purchased by him by such bills, with security as aforesaid, or otherwise howsoever, but had hitherto wholly neglected, and refused so to do, and then, to wit, on 8th, discharged the plaintiffs from tendering to him such bills to be accepted and delivered by him, with security as aforesaid, to the plaintiffs; contrary to the said conditions of sale, and the said promise of the defendant.

Plea.

The defendant pleaded—that, by and according to the course of dealing and usage of and amongst booksellers in London, in the way of their trade and business, then, long before and at the time of the putting up and exposing to sale by the plaintiffs of the said goods and chattels in the declaration in that behalf mentioned, and of the defendant

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binding such purchaser as in the declaration was alleged, used and approved of, when goods are sold in London by booksellers or a bookseller there to other booksellers or another bookseller there, in the way of a bookseller's trade and business, under and subject to the like conditions of sale as those in the declaration mentioned, the security in such conditions mentioned, if the seller should require the same, is to be required before or at the time the goods are delivered to and taken away by the purchaser thereof, and not afterwards: of which course of dealing and usage the plaintiffs at the time of putting up and exposing to sale by them of the said goods and chattels in the declaration mentioned, and of the defendant becoming such purchaser as aforesaid, to wit, on the 16th October, 1834, had notice: that the said goods so alleged to have been sold by the plaintiffs to the defendant as in the declaration was mentioned, under and subject to the said conditions of sale, were so sold in London as aforesaid by the plaintiffs, then being booksellers there, to the defendant, then also being a bookseller there, in the way of a bookseller's trade and business there, and were so sold as aforesaid subject and according to the said usage and course of dealing; that, after the time of the defendant becoming such purchaser of the said goods as in the declaration mentioned, to wit, on the 1st December, 1834, the same goods were delivered by the plaintiffs to the defendant and taken away by him; and that the defendant always from the time of his becoming such purchaser of the said goods and chattels as in the declaration was mentioned, until and at the time when the said goods were so delivered to and taken away by him as aforesaid, was ready and willing to settle and pay for the same goods by bills, with security, if required, according to the said conditions of sale and the said course of dealing and usage; but that the plaintiffs did not at any time before or when the said goods were so delivered to and taken away by the defendant, require security for the

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said goods, or require the defendant to settle for the said goods by bills, with security, but wholly omitted so to do; and that the plaintiffs did not at any time require the defendant to settle or pay for the said goods by bills alone, without security; and further, that the plaintiffs always after the same goods were so delivered to and taken away by the defendant as aforesaid, to wit, on &c., and often afterwards, wholly refused to take, accept, or receive bills for the said goods without having security also, although the defendant, after the said goods were so delivered to and taken away by him as aforesaid, to wit, on &c., offered to the plaintiffs to settle and pay for the said goods by bills, according to the said conditions of sale and the said course of dealing and usage—concluding with a verification.

Replication.

The plaintiffs replied—that the defendant, at the said time when &c. in the first count mentioned, of his own wrong, and without the cause by the defendant in his plea alleged, committed the said breach of promise in the first count mentioned, in manner and form as the plaintiffs had above thereof complained against the defendant.

Special demurrer.

To this replication the defendant demurred for duplicity—the traverse being cumulative, as applying at once to the contract and the custom, and such a traverse not being applicable in actions of assumpsit.

Joinder.

The plaintiffs joined in demurrer.

Addison, in support of the demurrer.—The general replication de injuriâ is not allowable in assumpsit; and, even if this had been an action of trespass, still the replication would have been ill. The leading authority upon the subject is *Criogate's case*, 8 Rep. 67. There, the defendant in an action of trespass for driving the cattle of the plaintiff, pleaded a right of common in a copyholder over the locus in quo, by prescribing, in the usual way, in the name of the lord of the manor; and because the plain-

tiff had wrongfully turned his cattle there, the defendant, as servant of the copyholder, and by his command, justified driving the cattle out. To this plea the plaintiff replied *de injuriâ*; and, upon demurrer, it was adjudged that the general replication in that case was insufficient; and Lord Coke then proceeds to lay down four resolutions of the court, in the course of which he thus states the nature of this general plea—"The general plea *de injuriâ sua propria &c.* is properly when the defendant's plea doth consist merely of matter of excuse, and of no matter of interest whatever." The resolutions of the court were four—"First, that *absque tali causa* doth refer to the whole plea, and not only to the commandment; for, all makes but one cause, and any of them without the other is no plea by itself—secondly, it was resolved, that, when the defendant, in his own right, or as servant of another, claims any interest in the land, or any common, or rent going out of the land, &c., there *de injuriâ sua propria &c.* generally is no plea; but, if the defendant justifies as servant, there *de injuriâ sua propria &c.*, in some of the cases, with a traverse of the commandment, that being made material, is good—thirdly, it was resolved, that, when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuriâ sua propria &c.*: the same law of an authority given by law, as, to view waste, &c.—lastly, it was resolved, that, in the case at bar, the issue would be full of multiplicity of matter, when an issue ought to be full and single; for, parcel of the manor, demiseable by copy, grant by copy, prescription of common, &c., and commandment, will be all parcel of the issue." In *Com. Dig. Pleader* (F. 18), it is said: "If defendant pleads a plea merely in excuse of an injury to the person or the reputation of another, *de son tort de meisme sans tiel cause* is a proper replication"—citing

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Crogate's case. In *Taylor v. Markham*, Cro. Jac. 224, Yelv. 157, in an action of trespass and battery, the defendant pleaded that he at the time of &c. was seised of the rectory of D. in fee, and that, at the same time and place where the trespass and battery were supposed &c., corn was severed from the nine parts; and for that the plaintiff would have carried away his corn, the defendant there stood in defence thereof, and kept the plaintiff from carrying it away, so as the harm which the plaintiff received was of his own wrong &c. The plaintiff replied that the trespass and battery were done sans tiel cause alledg. &c.: whereupon the defendant demurred in law. And it was adjudged for the plaintiff; "for, it is not requisite in this case for the plaintiff to answer the defendant's title, because he doth not by this action claim anything in the land or corn, but only damages for the battery, which is collateral to the title. And therefore the general replication is good. But, when the plaintiff makes a title in his declaration to anything, and the defendant pleads another thing against it, the plaintiff must reply severally, and not say sans tiel cause, as it is in 14 H. 4, fo. 32, pl. 45, and 16 Ed. 4, fo. 4, pl. 10." In the present case, the plea does not go to excuse the breach: it goes to deny the contract as stated in the declaration; it states the contract to have been made subject to another incident, arising out of the custom of the trade; and such custom ought to have been specially traversed—*Bankes v. Parker*, Hob. 76. Besides, the traverse is too large. In *Solly v. Neish*, 2 C. M. & R. 355, where the general replication de injuria was pleaded to an action of assumpsit, although the point was not expressly determined, the inclination of the court was against its admissibility.

John Henderson, contra.—The replication is good. *Solly v. Neish* does not decide the general question as to the applicability of the replication de injuriâ in assumpsit.

Before the decision in *Bardons v. Selby*, 3 M. & Scott, 280, 9 Bing. 756, 3 B. & Ad. 2, 3 Tyr. 431, 1 C. & M. 560, *de injuriâ* was understood to apply only to actions of tort, such as trespass and trespass on the case, but not to actions of contract or in replevin—*Jones v. Kitchen*, 1 B. & P. 76: but *Bardons v. Selby* established its applicability in the last mentioned form of action. The absence of precedents to show that it has ever been allowed in *assumpsit* therefore affords no argument against it. It is to be observed also that the action of *indebitatus assumpsit* was not completely established at the time of the decision in *Crogate's* case. Before the new rules of pleading, there might be good reason why the general replication should not have been resorted to in *assumpsit*; for, the general issue of non *assumpsit* was sufficient to let in every sort of defence. But now the case is different. The defendant is in general bound to state his grounds of defence specially upon the record: and, unless the plaintiff can by the general replication put in issue all the material facts traversed by the plea, he will go to trial at great disadvantage. There can be no substantial reason why the assertion and denial of facts should not be governed by the same rules in all cases. This plea might have been demurred to: but the plaintiff was not bound to demur; he was entitled to treat the facts stated in the plea as one combined proposition, and to present the cumulative denial as he has done. In *Carr v. Hinchliffe*, 7 D. & R. 42, 4 B. & C. 547, to *assumpsit* for goods sold and delivered, the defendant pleaded “that the goods were, with the privity of the plaintiff, sold and delivered to the defendant by J. S., the agent of the plaintiff, in the name and as the goods of J. S., and that the defendant never knew the plaintiff as the owner; that, at the time of the sale and delivery, J. S. was and still is indebted to the defendant in a sum exceeding the price of the goods, and that the defendant is ready and willing to set off and allow

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to the plaintiff the price of the goods out of the money so due and owing from J. S.:" and it was held that the plea was good, on special demurrer. Bayley, J. said: "It has been argued that the plea will lead to inconvenience, as it imposes on the plaintiff the hardship of being compelled to admit one half of the defendant's case. But I am by no means convinced that the supposed evil will occur. I am not prepared to say that the plaintiff might not have framed his replication so as to put in issue both the sale by the factor, as alleged in the plea, and the debt stated to be due from him to the defendant. These two facts constitute one matter of defence, and the replication suggested might probably be supported by the cases of *Robinson v. Raley*, 1 Burr, 816, and *O'Brien v. Saxon*, 2 B. & C. 908, 4 D. & R. 579." In *Robinson v. Raley*, to a plea of right of common to an action for breaking and entering a close, the plaintiff replied, traversing "that the defendant's cattle were his own cattle, that they were levant and couchant upon the defendant's premises, and that they were commonable cattle: it was held that the replication was not double, for, though several facts were put in issue, it was only one point, viz. whether the defendant's cattle was entitled to common. In *O'Brien v. Saxon*, which was an action for maliciously suing out a commission of bankrupt against the plaintiff, the defendant pleaded that the plaintiff, being a dealer and chapman, and indebted to the defendant in the sum of 100*l.*, became bankrupt within the meaning of the statutes concerning bankrupts, wherefore the defendant sued out the commission in the declaration mentioned. The plaintiff replied that the defendant of his own wrong &c. committed the grievances mentioned in the declaration. On demurrer, assigning for cause that the plaintiff by his replication had attempted to put in issue three distinct allegations, viz. the trading, the act of bankruptcy, and the petitioning creditor's debt: it was held that the replication was sufficient, the plea of

bankruptcy being pleaded only as matter of excuse, and that these three facts connected together constituted but one entire proposition. So, in *Rowles v. Lusty*, 4 Bing. 428, 1 M. & P. 102, a plea setting out a title in the defendant, and stating a devise, and also the levying of a fine, either of which would have been a bar to the action, was held not to be double, the whole together tending to shew that the title was in the defendant. The rule laid down in these cases is not violated on the present occasion: the plea consists of one entire proposition, viz. that there were peculiar circumstances existing to qualify the contract declared on.

The plea, however, is bad in substance, upon another ground, viz. that the custom therein alleged is unreasonable and inconsistent with the contract declared upon. In *Wigglesworth v. Dallison*, Doug. 196, where the question was whether a custom that tenants, whether under a lease or a parol demise, should have the way-going crop, was a good custom, Lord Mansfield says: "The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease. So, in *Boraston v. Green*, 16 East, 71, it was held, that, however an incoming tenant might maintain an action against the off-going tenant for a breach of the custom of husbandry in the place, in not leaving one third of the 'way-going crop of wheat sown upon a clover-brush, yet the custom of the country could have no place where the off-going tenant held under a lease expressly making a different provision in respect of the way-going crop, or where he continued to hold over after the expiration of such a lease, without coming to any fresh agreement with his landlord, by which he must be taken to hold under the same terms. And in *Webb v. Plummer*, 2 B. & A. 746, it was held that the express terms of a lease cannot be controlled by the custom of the country:

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but, if the lease be entirely silent as to the time of quitting, evidence of the custom of the country may be given to fix the time. *Holding v. Piggott*, 5 M. & P. 427, 7 Bing. 465, is to the same effect. In *Yeats v. Pim*, 2 Marsh. 141, 6 Taunt. 445, Holt, 59, it was held that an usage of trade cannot be set up in contravention of an express contract; and therefore where A. agrees to sell to B. a quantity of prime bacon, which B. weighs and examines, and pays for it by a bill at two months, but before the bill becomes due gives notice to A. that the bacon does not answer the contract, B. cannot give in evidence a custom that the buyer was bound to reject the contract, if at all, at the time of examining the goods. Here, the custom set out in the plea is in direct contravention of the contract declared upon, and is unreasonable. The contract upon which the declaration is founded is a contract of present sale and future payment, with a proviso for security. If the purchaser were entitled to immediate possession of the goods, he might enforce the delivery by an action of trover or an action for the nondelivery. Is it reasonable that the demand of security should precede the demand of the delivery of the goods? The effect of the custom set up by the plea is, to deprive the plaintiff of a right he intended to reserve to himself, and is therefore clearly inconsistent.

Addison, in reply.—In *Selby v. Bardons*, 3 B. & Ad. 16, Lord Tenterden, who differed from the rest of the court, says: "I consider the system of special pleading which prevails in the law of England to be founded upon and to be adapted to the peculiar mode of trial established in this country, the trial by jury; and that its object is to bring the case before trial to a simple, and, as far as practicable, a single question of fact, whereby not only the duties of the jury may be more easily and conveniently discharged, but the expense to be incurred by suitors may

be rendered as small as possible. And experience has abundantly proved that both these objects are better attained where the issues and matters of fact to be tried are narrowed and brought to a point by the previous proceedings and pleadings on the record, than where the matter is left at large to be established by proof, either by the plaintiff in maintenance of his action, or by the defendant in resisting the claim made upon him." In this case the court would not be acting consistently with the new rules if they allowed the general replication de injuria, when those rules have so materially varied the effect of the general issue. The plea here pleaded strikes at the title of the plaintiff: it altogether denies his right to recover in respect of the contract stated in the declaration; whereas the replication de injuria only applies to cases of tort, where the plea is in excuse of the injury complained of. The very language of the traverse shews this.—Then it is said that the custom set up by the plea is inconsistent with the contract stated in the declaration, and that it is an unreasonable custom. If the parties have by their contract recognized the custom, it is perfectly immaterial whether it is reasonable or not. There is, however, nothing unreasonable in saying that the security shall be required, if at all, before the goods are parted with. The usage is clearly not inconsistent with the contract declared on: unless the vendor gets security before he parts with his goods, he has only the personal security of the purchaser. In Starkie on Evidence, 2nd edit., Vol. 2, p. 567, the rule is thus stated: "In commercial affairs, and all the other usual and common transactions of life, it would be attended with great inconvenience that the well-known and ordinary practice and usage on the subject should not be tacitly annexed, by virtue of such a presumption, to the terms of a contract, and that the parties should either be deprived of the certainty and advantage to be derived from the known course of dealing, or be placed under the

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necessity of laboriously specifying in their contracts by what particular usages they meant to be bound." With regard to bills of exchange, the custom of merchants gives three days of grace beyond the prescribed period of payment, and imports consideration. In *Lethulier's* case, 2 Salk. 443, it was held that the clause "warranted to depart with convoy," must be construed according to the usage among merchants, that is, from such place where convoys are to be had, as, the Downs, &c. In *Baker v. Payne*, 1 Ves. jun. 459, where the captain of an India ship sold all his china ware and merchandize which he brought home on his last voyage, and covenanted to deduct all due allowances &c., he was permitted to give evidence of a custom to shew that such allowances were to be limited by the price which he was to receive. In *Donaldson v. Forster*, Abbott on Shipping, part 3, ch. 1, at the trial before Lord Kenyon of an action on a charterparty by which it was stipulated that the merchant should have the exclusive use of the ship outwards, and the exclusive privilege of the cabin, the master not being allowed to take any passengers; at which trial the defendants insisted, that, under a charterparty so worded, it was the constant usage of trade to allow the master to take out a few articles for private trade: his Lordship suffered evidence to be given to prove the usage, observing, that, although *primâ facie* the deed excluded that privilege, yet he thought the deed might be explained by uniform and constant usage, the usage being a tacit exception out of the deed. There the usage of which evidence was admitted, was in express contradiction of the contract. And in *Smith v. Wilson*, 3 B. & Ad. 728, in a lease, *inter alia*, of a rabbit warren, the lessee covenanted that, at the expiration of the term, he would leave on the warren ten thousand rabbits, the lessor paying for them 60 $\frac{1}{2}$ per thousand: in an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term, it was held that *parol* evidence was admissible

to shew that, by the custom of the country where the lease was made, the word "thousand," as applied to rabbits, denoted "twelve hundred." [*Tindal*, C. J.—These are rather cases where evidence was held to be receivable in explanation of the terms used.] In *Clayton v. Gregson*, 4 N. & M. 602, in an action for a breach of a covenant in a lease of coal mines, to get the whole of the veins of coal lying under certain closes "not deeper than or below the level of the bottom of the mine" at a certain point, evidence was held receivable to shew that by the miners in the neighbourhood, the word "level" is used in a certain peculiar sense (a).

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Cur. adv. vult.

TINDAL, L. C. J., now delivered the judgment of the court:—This case comes before us upon a special demurrer to the plaintiff's replication. And the first question is, whether the replication is good in point of law. The plaintiff declares in his first count upon a contract of sale of certain books to the defendant, under certain special conditions set out in the declaration. To this the defendant pleads in bar, that the books were sold to him upon the conditions set out in the declaration, but subject and according to the usage and course of dealing observed amongst booksellers in London, by which usage and course of dealing, as stated in the plea, a material variation is made in the terms of the contract declared upon; and he concludes his plea with a verification. To this plea the plaintiffs have replied in the general form, "that the defendant of his own wrong, and without the cause by the defendant in his plea alleged, committed the breach of promise in the first count mentioned, in manner and form" &c., concluding to the country: and to this replication the defendant demurs specially, shewing the causes of demurrer therein contained. And we are of

(a) See *Hutton v. Warren*, 1 Meeson & Welsby, 466.

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opinion that the replication, upon the state of this record, is informal and insufficient.

It is well known that this general form of replication is allowed in actions of trespass, and of trespass on the case, where the defendant's plea is merely in excuse of an injury to the person or reputation of another. In those cases, although a plea may contain a multiplicity of facts, yet, if they amount, when taken altogether, to an excuse of the act complained of, and contain neither matter of record nor any claim or interest in or out of land, nor any authority from the plaintiff, the plaintiff is allowed to put in issue all the facts which constitute the defendant's excuse by this general traverse. Whether this form of replication, which has hitherto been used in actions of trespass and actions on the case only, is applicable to an action upon promises, may be doubtful (*b*); but, without entering into that question, it is clear that it can only be applicable where the plea states matter which admits the promise as laid in the declaration, and excuses its non-performance. The form and language of the replication proves this: it is a denial of *the excuse* contained in the defendant's plea: unless the plea, therefore, does consist of matter of excuse, there is no issue joined. But we think this plea, which seeks to introduce a new condition into the special promise stated in the declaration, does not admit that promise and excuse the non-performance of it, but does in effect deny that such promise was ever made. The replication, therefore, which only proposes to deny the excuse set up in the plea, where no excuse is alleged, appears to us to be informal and insufficient.

The plaintiff, however, objects to the plea itself; and, if that plea is bad *in substance*, undoubtedly, upon the whole record, the plaintiff ought to prevail. The objection taken to the plea is, that the defendant cannot by law vary the terms of a written contract by the introduction of

(*b*) See *Griffin v. Yates*, post, Vol. 3, Easter Term, where the point is decided in the affirmative.

the custom and usage of the trade; and that, and as he would be precluded from shewing such custom or usage in evidence, he is equally prevented from pleading the same in bar of the action. How far a mercantile custom reduced to writing and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of a general course and usage of the trade within the limits of which the contract was made and to which it relates, is a question which it would be difficult to answer with exactness and precision. But in this case we think the question does not occur; for, we think ourselves not bound to take notice upon this record, that there was any contract or agreement signed by the defendant. There is no such allegation in the declaration: and although we might be led to conjecture from some of the expressions therein used, that such was the fact, we think it by no means sufficiently clear upon the pleadings to warrant us to infer it in support of an objection to the defendant's plea. The plea, therefore, not having been specially demurred to as amounting to the general issue, or upon any other ground of form, we think, as the facts stated therein are admitted by the plaintiff's demurrer, that it is a plea substantially good; and therefore give our judgment for the defendant.

Judgment for the defendant.

DOE *d.* MILBURN *v.* EDGAR.

Wednesday,
Nov. 25th.

THIS was an action of ejectment brought to recover two pieces of land situate in the parish of Uphill, in the county

der an assignment for the benefit of creditors under the lords' act, 32 Geo. 2, c. 28, ss. 16, 17, it seems that the assignment indorsed on the schedule and the rule for the prisoner's discharge are sufficient to establish the title of the lessor of the plaintiff: at all events, it is not necessary to prove the steps preliminary to bringing the prisoner before the court; the rules of court under which he was brought up and remanded alone can be required.

An incorrect or over large statement of the trusts of the assignment will not vitiate the instrument: probably, an entire omission to state any trusts would not have that effect.

All the prisoner's property passes under the general words of the assignment, and not merely that which is specifically pointed out in the schedule.

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Quære, how far a defendant may by his plea vary the terms of a written contract by the introduction of the custom and usage of the trade?

In ejectment, where the lessor of the plaintiff claims title under

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of Somerset. At the trial before Coleridge, J., at the last Summer Assizes for the county of Somerset, the following facts appeared in evidence:—In the year 1813, Uphill common was inclosed and allotted by act of parliament, 53 Geo. 3, c. cii. The two pieces of land in question were the allotments made under the act to one Simon Payne. Towards the end of 1813, an instrument in writing (not produced) passed between Simon Payne and one John Henry Gegg, under which the interest of Payne in the two allotments was supposed to have been conveyed to Gegg. A sum of 200*l.* was then paid by Gegg to Payne as part of the purchase money, and a further sum of 200*l.* shortly afterwards. On the 13th July, 1814, Payne gave to the commissioners under the inclosure act an authority in writing to deliver possession of the two allotments in question to Gegg, stating that he had sold them to him. From that time until his bankruptcy in 1828, Gegg held the property as his own, paying interest upon 400*l.* to Payne down to that period: and upon Gegg's bankruptcy, his assignees sold it to the defendant, who remained in undisturbed possession until the 17th October, 1834, the day of the demise laid in the declaration. There was no proof of any award made by the commissioners under the inclosure act. In the year 1831, Payne, who was then a prisoner for debt in gaol of the Fleet, at the suit of the lessor of the plaintiff and of several other creditors, was brought by the former before this court under the compulsory clauses in the lords' act, 32 Geo. 2, c. 28, ss. 16, 17. After having been remanded six several times, the prisoner ultimately delivered in a schedule of his property, and executed the assignment (to the lessor of the plaintiff and Thomas Hyde) required by the act on the back of the same, and was, by a rule of court dated the 30th May, 1834, discharged. In order to prove his title under the assignment, the lessor of the plaintiff produced in evidence the schedule and assignment; but, on its being objected

that this was not sufficient, he produced the several rules (seven in number, which were proved by the secondary, Mr. Cancellor) under which Payne had been brought up, remanded, and ultimately discharged. The schedule contained (amongst others) the following statement:—

“I am possessed of the several manors or lordships of Uphill, Christon, and Bradford, in the county of Somerset, with all rights and appurtenances thereto belonging; the manor of Uphill, consisting of a house and other out-houses, barns, stables, and other buildings, and many closes of land containing several hundred acres of arable and pasture land; the manors of Christon and Bradford, situate at Axbridge and Axbridge Hill, in the said county of Somerset, consisting of many dwelling-houses, barns, stables, and other buildings, and many closes or pieces of arable, meadow, and pasture land, containing several hundred acres. I have also due to me from John Henry Gegg, for estates sold by William Preest as my trustee, the sum of 600*l.* and interest; and also the sum of 800*l.* for some lands sold by me to the said John Henry Gegg, and interest.”

The assignment indorsed upon the schedule in pursuance of the act, was as follows:—

“I, the within-named Simon Payne, in pursuance of the compulsive clauses in the several acts of parliament made and passed for the relief of debtors with respect to the imprisonment of their persons, and no other persons having applied for any share thereof, do hereby grant, assign, transfer, and set over unto the within-named plaintiff Alexander Milburn, and Thomas Hyde, their and each of their heirs, executors, administrators, and assigns, in trust for *himself* and such other creditors at whose suit I am now charged or detained in custody, and who have consented to my discharge, all and singular *the* real and personal estate, whether in possession, reversion, remainder, or expectancy; and particularly all the goods,

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Schedule.

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chattels, debts, credits, effects, and other property and estate which are mentioned in the within schedule, and all deeds, books, papers, and writings and securities relating thereto. Witness my hand this 23rd day of May, 1831.

"S. Payne."

"Signed, sealed, and delivered by the above-mentioned Simon Payne, the words 'Thomas Hyde, their and each of their' having been previously inserted, in the presence of John H. Cancellor, one of the secondaries of the court of Common Pleas."

The assignment was not executed until the 30th May; when the following rule was pronounced:—

"Alexander Milburn v. Simon Payne."

Rule for dis-
 charging the
 prisoner.

"Upon reading a rule made in this cause on Wednesday, the 10th day of November, in Michaelmas Term last, another rule made in this cause on Monday last, the affidavit of Thomas Hyde, gentleman, sole executor of Thomas Hyde, one of the creditors of the defendant named in the certificate of the warden of his majesty's prison of the Fleet, and the affidavit of Ann Harris, sole executrix of James Harris, another of the creditors of the defendant named in the said certificate; and the defendant being brought into this court pursuant to the said rules, and having delivered into court upon oath a true account in writing, signed by him, of all his real and personal estates, and of all incumbrances affecting the same, to the best of his knowledge and belief, and having executed an assignment thereof to the plaintiff and to the said Thomas Hyde, and the said Thomas Hyde and Ann Harris by their counsel severally consenting: it is ordered that the defendant be discharged out of the custody of the warden of his majesty's prison of the Fleet as to the several detainers against him at the suit of the said plaintiff and the said Thomas Hyde and James Harris, pursuant to the

directions of the act of parliament made for the relief of debtors with respect to the imprisonment of their persons, and to oblige debtors who shall continue in execution beyond a certain time, and for sums not exceeding what are mentioned in the act, to make discovery of and deliver up on oath their estates for their creditors' benefit."

Upon this evidence, the learned judge directed a verdict to be entered for the lessor of the plaintiff, reserving leave to the defendant to move to enter a nonsuit if the court should be of opinion that the evidence did not shew the land in question vested in the lessor of the plaintiff.

Erle, on a former day, accordingly obtained a rule nisi, upon three grounds (a)—first, that the rules of court, the schedule, and the assignment, were not sufficient; but that the lessor of the plaintiff ought to have shewn that all the preliminary steps required by the act to give validity to the assignment, had been duly taken—secondly, that the assignment itself was insufficient, the trusts thereof not being stated in conformity with the statute—thirdly, that the assignment contained no words calculated to pass the land in question.—1. The 16th section of the 32 Geo. 2, c. 28, provides, "that, if any prisoner committed or charged in execution for any debt or damages not exceeding the sum of 300*l.*, besides costs of suit, shall not, within three months next after such prisoner shall be committed, or charged in execution as aforesaid, make satisfaction to his, her, or their creditor or creditors who shall charge any such prisoner in execution as aforesaid, for such debt, damages, and costs, then any such creditor &c. is and are hereby authorized and empowered to require every such prisoner, on giving twenty days' notice in writing to him or her respectively that such creditor &c. designs to compel any such prisoner to give

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As to the sufficiency of the evidence.
32 Geo. 2, c. 28, s. 16.

Notice to prisoner.

(a) Another point upon which the rule was also granted, was ultimately referred.

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Notice to the
 other detaining
 creditors.

Notice to the
 sheriff or gaoler.

in to the court at law from which the writ or process issued on which any such prisoner is or shall be charged in execution as aforesaid, &c. within the first seven days of the term which shall next ensue the expiration of the said twenty days, a true account in writing, and to be signed with the proper name or mark of every such prisoner, of all the real and personal estate of such prisoner, and of all incumbrances affecting the same, to the best of the knowledge and belief of such prisoner, in order that the estate and effects of such prisoner may be divested out of him or her, and may by the court, &c., be ordered to be assigned and conveyed in manner and for the purposes thereafter declared: and every such creditor or creditors as aforesaid who shall require any such prisoner to be brought up as aforesaid for the purpose aforesaid, shall also give twenty days' like notice in writing of such his, her, or their intention to require any such prisoner to be brought up as aforesaid, to discover and deliver up his or her estate as aforesaid to all and every other creditor and creditors of every such prisoner at whose suit any such prisoner shall be detained or charged in custody in any such gaol or prison, if such prisoner shall be there detained in custody or charged in execution at the suit of any other creditor or creditors besides the creditor or creditors giving such notice, if such other creditor or creditors can be found out or met with, and, if not, then to the several attorneys last employed in the respective actions or suits in which any such prisoner shall be so detained or charged in custody, &c.: and shall likewise give a like notice in writing to the sheriff or sheriffs, gaoler, or keeper of the gaol or prison in which such prisoner shall be detained in custody or committed or charged in execution, of such his or her intention to have any such prisoner so brought up, and to require such sheriff, &c. to bring up every such prisoner accordingly; and every such notice which shall be so given to any such sheriff, &c. shall be so given to him

or them respectively twenty days at least before the time appointed for any such prisoner to be so brought up," &c. &c. And the 17th section enacts, that every such prisoner shall, on proof being first made of such notices having been given, deliver in in open court, upon oath, within the time thereinbefore for that purpose prescribed, a full, true, and just account, disclosure, and discovery, in writing, of the whole of his or her real and personal estate, &c., and also of all incumbrances then affecting the same, &c., which account shall be subscribed with the proper name or mark of the prisoner respectively who shall so deliver in the same; and on the delivering in of any such account, the estate and effects of every such prisoner shall be assigned and conveyed by such prisoner respectively, by a short indorsement on the back of every such account as shall be so delivered in, to such person or persons as the court, &c., in which or to whom any such account shall be so given in, shall order or direct—in trust and for the benefit of the creditor or creditors who shall have required any such prisoner to be brought up, and of such other creditor or creditors (if any) of every such respective prisoner at whose suit or suits any such prisoner shall be charged in custody or in execution in any such prison or gaol, and who shall by any memorandum or writing to be signed by such creditor or creditors respectively before any such conveyance or assignment shall be made, consent to any such prisoner's being discharged out of gaol or prison at his, her, or their suit or suits, and also agree to take a proportionable dividend of such prisoner's estate and effects, with the creditor or creditors who shall have required any such prisoner to be brought up as aforesaid; and if there shall be no other creditor or creditors aforesaid of such prisoner, or, their being any such, if such other creditor or creditors shall not agree in writing to discharge such prisoner, and accept such proportionable dividend as aforesaid of the estate and effects

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Section 17—
Prisoner to deliver into court a schedule of his property,

and to assign the same by indorsement on the back of the schedule.

Trusts of the assignment.

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All the prisoner's estate, &c. to pass by such assignment.
 Overplus to be paid to the prisoner.

of any such prisoner, then in trust for the creditor or creditors only who shall require any such prisoner to be brought up for the purpose aforesaid: and by such assignment and conveyance as aforesaid all the prisoner's estate and effects shall be vested in the creditor or creditors to whom the same shall be assigned and conveyed, in trust as aforesaid; and, if any overplus shall remain of any such prisoner's estate, after payment of the debt or damages and costs which shall be due to any creditor or creditors respectively at whose suit or suits any such prisoner as aforesaid shall in pursuance of this act be discharged out of gaol or prison on delivering up his or her estate and effects as aforesaid, and all reasonable charges expended in or by means of getting in of such estate or effects, the same shall be paid to such prisoner, his or her executors, &c. In *Doe d. Perring v. Heath*, 2 Smith, 1, in ejectment, where the lessor of the plaintiff claimed title under an assignment for the benefit of creditors, on unstamped paper, under the lords' act, it was held that he was bound to prove the rules of the court for bringing up the prisoner and for his discharge, or at least the former rule; for, unless there is a rule to bring up the prisoner, the court has no power to order his discharge. So, here, the lessor of the plaintiff should have been prepared to shew that the prisoner was detained for such sums as he might be discharged from under the act, that the notices required by the act had been duly served upon the other creditors at whose suit the prisoner was detained, upon the prisoner, and upon the warden; as well as that he was duly brought before the court by rule, and from time to time remanded, and ultimately, having signed the schedule and assignment required by the act, discharged. 2. The act requires the assignment to be made in trust "for the petitioning creditor and for such other of the creditors as should, before the assignment, by a memorandum in writing, and signed by them, consent to the prisoner's being discharged out

Second point
 —Statement of
 trusts of the assignment.

of custody, and agree to accept a proportionable dividend of the estate with the petitioning creditor." Here, it did not appear that the creditors in trust for whom this assignment was made did consent in writing to the prisoner's discharge before the execution of the assignment. 3. There are no words in the assignment or in the schedule applicable to the land in question: only that which is specified in the schedule can pass by the indorsement; and the schedule makes no mention of this land, but merely of a debt of 800*l.* and interest which the prisoner claimed in respect of it.

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Crowder and *Ball* now shewed cause.—1. The assignment was made in court, and by the proper officer; it must be assumed that the court have properly exercised the authority given them by the statute, that every thing required by the act to be previously done was done. The assignment and the rule for the prisoner's discharge alone were sufficient: but the proof went even further; all the rules for bringing up and remanding the prisoner were put in and proved by the secondary. In *Doe d. Perring v. Heath*, the prisoner was brought up at his own instance, not under ss. 16 and 17; and the lessor of the plaintiff failed in proof of the assignment. 2. As to the form of the assignment—The trusts undoubtedly are not quite correctly stated: but the act is merely in this respect directory, and it must receive a liberal construction in order to carry into effect the intention of the legislature. The assignment would be sufficient without any statement of trusts whatever: the court would see that the distribution of the prisoner's property was made in conformity with the act. In the case of a deed, an invalid or informal statement of a trust therein will not vitiate the whole instrument. Is the whole proceeding here to be rendered null because there is accidentally inserted incorrectly in the assignment something which need not have been stated at all? 3. It

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is said the assignment only operated to pass the debt due from Gegg, and not the land, because it is not specifically mentioned. The object of the act was to pass by the assignment *all* the property of the prisoner, whether real or personal: every thing will pass that can be found; he cannot be permitted to smuggle anything from his creditors.

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Erle and *Barstow*, in support of the rule.—1. Where a party seeks to give effect to an instrument by force of an act of parliament, it is incumbent upon him to shew that the provisions and requisitions of the act have in every respect been satisfied and complied with. Here, the lessor of the plaintiff having failed to shew that the court had jurisdiction at the commencement, the intermediate rules are altogether unavailing. The assignment is not the act of the court; the signature of the prisoner is requisite to the conveyance of his property: nor is the assignment a record of the court; it is handed over to the assignee as the document upon which his title to the property is founded. *Doe d. Perring v. Heath* is the only direct authority to be found upon the subject; and that case clearly shews that the evidence given here was not sufficient to support the title of the lessor of the plaintiff. In the case of bankruptcy, the assignees, in order to substantiate their title under the assignment, were bound (before they were aided by the statute) to begin *ab ovo*, and to prove the trading, the petitioning creditor's debt, and the act of bankruptcy. So, where a party claims under an *elegit*, he is bound to produce the judgment roll in order to shew a legal foundation for the writ of *elegit*. [*Tindal*, C. J.—The award of the *elegit* is the act of the party; the judgment is the act of the court.] 2. The trusts are not alleged in accordance with the statute: the assignment should have been in trust only for the petitioning creditor and such of the other detaining creditors as had before the making of the assignment *in writing* consented to the prisoner's discharge.

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By the form here adopted the property may be diverted into a channel foreign from that contemplated by the act, and the prisoner deprived of the surplus which the act gives him after the consenting creditors are satisfied. An order made by justices of peace under the statute 13 Geo. 3, c. 78, s. 19, for stopping an old footway and setting out a new one, must follow the form prescribed in the schedule annexed to the act, and set forth the length and breadth of the new footway; otherwise it is no answer to a justification of right of way pleaded to an action of trespass quare clausum fregit brought by the owner of the soil over which the old way led—*Davison v. Gill*, 1 East, 64. An indictment against this party for refusing to execute the assignment required by the act, would not be supported by evidence that an assignment in the form of the present one had been tendered to him for execution, and he had declined to execute it. 3. At all events, it is perfectly clear that nothing can pass by this assignment, except the property mentioned in the schedule; and the schedule charging a debt of 800*l.* as due from Gegg to Payne, in respect of the purchase of the land in question, shews conclusively that the land itself did not and could not pass under the assignment.

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TINDAL, C. J.—Three objections have been urged in this case against the validity of the assignment. The first is, that, on the occasion upon which it was produced in evidence, it was not sufficiently shewn that the court had authority to direct the assignment to be made: the defendant contending that the simply putting in the assignment was not enough, but that the lessor of the plaintiff should have shewn that all the notices required by the statute had previously been duly served. Great difficulties would often ensue if it were necessary in cases of this description to prove all the steps preliminary to the assignment—the notices to the creditors, to the gaoler, to the prisoner, and

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the various other particulars enumerated in the act. Still, if the law requires it, the proof must be given. I feel, however, no difficulty in holding that the production of the assignment, attested by the proper officer, was sufficient. The 17th section of the statute enacts, "that every prisoner charged or who shall be charged in execution as aforesaid, and who in pursuance of the act shall, at the desire of any of his, her, or their creditor or creditors, his, her, or their executors or administrators, be brought up to any such court, assizes, or great sessions as aforesaid, shall, *on proof being there first made of such notices as are therein-before directed to be given having been given*, deliver in there in open court, upon oath, within the time therein-before for that purpose prescribed, a full, true, and just account, disclosure, and discovery in writing of the whole of his or her real and personal estate." The investigation, therefore, of the due service of the notices required by the statute, and proof of their sufficiency as to form and as to the persons on whom they were to be served, was a necessary preliminary to the exercise of the authority of the court in directing the assignment to be made. It is not necessary for us to hold the assignment to be conclusive evidence: it is enough to say that it was good evidence until impeached by the other side. In *Doe d. Perring v. Heath*, the question turned rather upon the authenticity of the document. Here, if it were necessary (which I am far from thinking it was), all the preliminary steps were sufficiently proved; the lessor of the plaintiff put in seven rules of court: these rules identified the assignment as emanating from the act of the court, and shewed that the authority of the court had been duly exercised in the matter. The second objection is, that the trusts of the assignment are not properly stated—being "for the lessor of the plaintiff and Thomas Hyde, their and each of their heirs, executors, administrators, and assigns, in trust for *himself* and such other creditors at whose suit I am now charged or detained in

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custody and who have consented to my discharge." The trusts are in fact stated more largely than the creditors have a right to avail themselves of. The statute requires the assignment to be made "in trust and for the benefit of the creditor or creditors who shall have required any such prisoner to be brought up, and of such other creditor or creditors (if any) of every such respective prisoner at whose suit or suits any such prisoner shall be charged in custody or in execution in any such prison or gaol, and who shall, *by any memorandum or writing to be signed by such creditor or creditors respectively before any such conveyance or assignment shall be made*, consent to any such prisoner's being discharged out of gaol or prison at his, her, or their suit or suits, and also agree to take a proportionable dividend of such prisoner's estate and effects, with the creditor or creditors who shall have required any such prisoner to be brought up." The omission of the words in italic is immaterial. No creditor who had not, before the assignment, consented to the prisoner's discharge in the mode pointed out by the act, could avail himself of it. It would therefore be a very hard thing to hold those that are entitled to be concluded because the statement of the trusts has taken a wider range than the statute requires. The prisoner could sustain no prejudice; for, the court, having it in their power, would take care that the assignment should not have a more extensive effect than the act authorizes. Indeed the indorsement itself supplies the remedy, for it shews that the lessor of the plaintiff and Hyde only had consented to the prisoner's discharge. If even no trusts were therein declared, it is by no means clear that the assignment would not carry the legal estate, and that the court would not have moulded the trusts so as to carry into effect the object of the legislature.—The third objection is that the land did not pass by the description contained in the schedule. I agree that the statement contained in the schedule evinces an intention to pass

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the purchase money only. But then there are general words in the assignment sufficient to pass all the property of the prisoner, both real and personal. The assignment having been made in obedience to the statute, the fair inference is that it was intended to pass and did pass all the property of the party. For these reasons, I am of opinion that there is no ground for either of the objections; and that the assignment is a valid one.

PARK, J., was at chambers.

GASELEE, J.—I am of the same opinion. In *Doe d. Perring v. Heath*, the rules under which the prisoner was brought up were not produced in evidence. Here every step was proved: no less than seven rules were put in, the last being that which directed the prisoner's discharge. By the act the prisoner is required to give in a true account in writing, and signed by him, of all his real and personal estate; he is then to execute a conveyance of his estate and effects, by a short assignment on the back of the account above-mentioned, to such person as the court shall direct, in trust for the petitioning creditor and for such other of the creditors as will before the assignment, by a memorandum in writing and signed by them, consent to the prisoner's being discharged out of custody, and agree to accept a proportionable dividend of the estate with the petitioning creditor. And when the assignment is made to the satisfaction of the court, he is to be discharged. The assignment, it is said, is not the act of the court. But it is made on the back of the schedule, which is a record of the court, and is attested by the officer, and can only be made under the authority and with the approbation of the court.—With respect to the second point—I am of opinion that the assignment would have been valid without any declaration of trust: a deficiency in that particular would have been supplied by the act of parliament.

—It is further contended that the land now in question did not pass by the assignment. What did pass? All the real and personal estate of the prisoner of whatever description.

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BOSANQUET, J.—I am of opinion that the assignment in question is sufficiently shewn to have been made under the authority of the court. The several rules for bringing up and for discharging the prisoner, and the assignment itself attested by the proper officer, were all the evidence that could be required to shew that the court had jurisdiction and that that jurisdiction had been properly exercised. The mode in which the trusts are stated does not, in my opinion, prevent the assignment from operating to convey all the estate and effects of the prisoner. The statute requires the assignment to be made by a short indorsement on the back of the schedule. Even had it omitted all mention of the trusts upon which it was made, I think the assignment would have been good. I also think the general words of the assignment sufficient to convey all the property of the prisoner, whether real or personal.

Rule discharged—the costs of and occasioned by the application to be paid by C. H. Payne, it appearing that he had improperly interfered in the matter (a).

(a) In Hilary Term, 6 Will. 4, a rule nisi was obtained for rescinding so much of the above rule as directed C. H. Payne to pay the costs; which rule was in Easter Term made absolute—it appearing from the affidavits that he had merely advised the proceedings on behalf of his mother, the personal representative of Simon Payne, his late father.

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A cause was referred, and the arbitrator stated the facts specially on his award for the opinion of the court. On the matter coming on for argument, the plaintiffs being advised that one of the defendants was improperly joined in the action—The court permitted them to discontinue, on payment of the costs of the cause (no provision being made for the costs of the reference and award) and of the motion, and undertaking not to bring any joint action against the two defendants, nor any separate action against the defendant so improperly joined.

TURNER and Others v. W. IZON and E. KETLAND.

THIS was an action for goods sold and delivered. The cause was referred, and the matters specially stated by the arbitrator on his award, in order to take the opinion of the court thereon. On the case coming on for argument, the plaintiffs were advised that the defendant Ketland had been improperly joined in the action; and—

Wilde, Serjeant, on a former day, obtained a rule calling upon the defendants to shew cause why the plaintiffs should not be at liberty to discontinue the action upon payment to the defendants of their costs of the action and of and occasioned by the application—the plaintiffs undertaking not to bring any joint action against the defendants in this cause. He referred to *Roberts v. Marriett*, 2 Wms. Saund. 73, where the court after demurrer joined gave the plaintiff leave to discontinue on payment of costs, and to the authorities collected in note (1) to that case (a); and

(a) "After demurrer argued and allowed, the court has permitted a discontinuance, on payment of costs, where there was a mistake in the plaintiff in pleading—2 Lev. 124, *Rex v. Burnis*; Ibid. 209, *Eut v. Withers*; 1 Lev. 191, *Jones v. Pope*, S. C. 1 Saund. 39, 1 Sid. 306; 1 Lev. 192, *Bennet v. Filkins*, S. C. 1 Saund. 23; 1 Lev. 298, *Martin v. Delboe*; 3 Lev. 440, *Stephens v. Cooper*; 1 Stra. 76, *Butler v. Malissy*; Ibid. 116, *Henderson v. Williamson*: but now the court usually gives the party leave to amend upon payment of costs. And, after special verdict, the plaintiff may discontinue by leave of the court, because it is not

complete and final: this, however, is a matter of great favour—1 Salk. 178, *Price v. Parker*. And the court will not grant leave in a hard action—Cases temp. Hardw. 200, 201, *Boucher v. Lawson*. Nor will they do it to give the plaintiff an opportunity of adducing fresh proof to contradict the verdict—2 Bl. Rep. 815, *Roe v. Gray*. And leave to discontinue is never granted after a general verdict—1 Lev. 48, Anon.; 1 Salk. 178, *Price v. Parker*; or after a writ of inquiry executed and returned—Cart. 86, *Stevens v. Etherick*, S. C. 1 Show 63. Or after a peremptory rule for judgment on demurrer—1 Salk. 179, *Turner v. Turner*."

also to Tidd's Practice, 9th edit. p. 679, where it is said—
 "The rule to discontinue may be had as a matter of course, from the clerk of the rules in the King's Bench, at any time before trial or inquiry (*Price v. Parker*, 1 Salk. 178): and leave has been given to discontinue after argument and before judgment on demurrer (*Stephens v. Cooper*, 3 Lev. 440; *Butler v. Malissy*, 1 Stra. 76, 116). And, even after a *special verdict*, the plaintiff may discontinue, by leave of the court, because that is not complete and final; but in this case it is a great favour (*Price v. Parker*): and it is never granted after a *general verdict*, or writ of inquiry executed and returned (*Stephens v. Etherick*, Carth. 86, 1 Show 63), nor after a peremptory rule for judgment on demurrer (*Turner v. Turner*, 1 Salk. 179). A discontinuance is not allowed in the Common Pleas after a special verdict, in order to adduce fresh proof in contradiction to the verdict (*Roe v. Gray*, 2 W. Bl. 815). And where the plaintiff moved to discontinue, upon payment of costs, after judgment given for him on demurrer, but not entered of record, and a writ of error brought, and bail put in thereupon, the court refused to make a rule to discontinue without payment of costs on the writ of error—*Pym v. Warren*, Barnes, 169."

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Goulburn, Serjeant, shewed cause.—The court have no power to interfere: or, if they have, the circumstances of this case are not such as to warrant them in so doing. [*Tindal*, C. J.—After a special verdict we clearly have authority to grant leave to discontinue: why have we not, therefore, after an award made setting out the facts specially?] Here, the verdict is final: the plaintiffs electing to retire from the argument, the defendants were entitled to judgment. This case, therefore, goes much further than that of a special verdict: and it is perfectly well understood, that a discontinuance is never permitted after a general verdict—*Price v. Parker*, *Stephens v. Etherick*;

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and the reason assigned is that it would enable the plaintiff to have as many new trials as he pleased. In *Roe d. Gray v. Gray*, the court refused to allow the lessor of the plaintiff to discontinue after a *special verdict*.

Wilde, Serjeant, in support of his rule.—The cases cited only tend to shew that the permitting a discontinuance is matter of favour: and in every instance in which a plaintiff has been refused the indulgence, he wished to bring *the same action* again. Here, however, the plaintiffs only seek to be allowed to bring another action against one only of the defendants, to try a totally different question.

TINDAL, C. J.—If by proceeding to judgment the defendants would be entitled to a different measure of costs, there might be good reason for our withholding the leave prayed by this motion. But, on looking to the reference and award, it will be found that the costs of the reference and award are not provided for. The simple question, therefore, is whether or not a second action may be brought. As at present advised, I see no reason why it should not. If any difficulty presents itself in the way of the plaintiffs, I cannot think we are doing wrong in removing it. The plaintiffs must, however, also undertake not to bring another action against the defendant Ketland alone.

The rest of the court concurring—

Rule absolute accordingly (b).

(b) See *Sweeting v. Halse*, 9 B. & C. 369, 4 M. & R. 544, where after a *general verdict* for the defendant, and a *rule absolute for a new trial*, the plaintiff had a rule to discontinue. There, although the question whether upon such discontinuance the defendant was entitled to the costs of the trial

(which it was held he was) was argued at length, the objection to a discontinuance after a *general verdict* was not mooted.

And see *Ames v. Ragg*, 2 Dowl. 35—*Goodenough v. Beetles*, 2 C. M. & R. 240.

“To entitle a plaintiff to discontinue after plea pleaded, it shall

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JACKSON v. ADAMS.

Wednesday,
Nov. 25th.

THIS was an action on the case for slander. The second count of the declaration stated, that, before the time of the committing the grievances by the defendant as next hereinafter mentioned, the plaintiff had been in a certain parish office, to wit, one of the churchwardens of the parish of Stoke Gabriel, in the county of Devon, and during the plaintiff's continuance in such his office had always faithfully and honestly demeaned himself in his said office of churchwarden; nevertheless, the defendant, well knowing the premises, but devising and maliciously intending, not only to injure the plaintiff in his said good name, fame, credit, and reputation with and amongst all his neighbours and other good and worthy subjects of this realm, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had been and was guilty of the misconduct and offences hereinafter mentioned to have been charged upon and imputed to him, and had grossly misconducted himself as such churchwarden as aforesaid, and to vex, harass, and oppress the plaintiff, theretofore, to wit, on the 7th October, 1834, in a certain discourse which the defendant then had with the plaintiff of and concerning the plaintiff and of and concern-

In an action for slander, imputing to the plaintiff that he, whilst churchwarden, stole the parish bell-ropes :—Held, that, inasmuch as an indictment for larceny could not be supported against a churchwarden for stealing the bell-ropes of the parish of which he is churchwarden, he having as such the possession of the goods of the church, the action was not maintainable.

But, as the second count of the declaration did not import on the face of it that the plaintiff stole the bell-ropes of the church whereof he was warden, but generally that he stole bell-ropes—

The court refused to arrest the judgment.

The second count contained an averment by way of innuendo, "that the plaintiff, whilst in his said office of churchwarden, had been guilty of stealing ropes, and that the subjects of our lord the king then understood that that was the meaning of the said words :"—Held, that the word "stealing," could not by any reasonable intendment have any other meaning than that of the commission of the offence of larceny; and therefore that the innuendo was negatived by the plaintiff's own evidence that the defendant had intended to impute to the plaintiff that he had defrauded the parish on the sale of the bell-ropes.

In an action of slander, words spoken by the defendant in relation to the same transaction, on a former occasion, are receivable in evidence to shew the animus.

not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent that, if they

are not paid within four days after taxation, defendant shall be at liberty to sign a nonpros." Reg. 106. Hilary Term, 4 Will. 4.

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ing his conduct as churchwarden as aforesaid, in the presence and hearing of divers good and worthy subjects of this realm, the defendant, contriving and intending as aforesaid, then and there, in the presence and hearing of the said subjects, falsely and maliciously spoke and published of and concerning the plaintiff and of and concerning his conduct as churchwarden as aforesaid, the false, scandalous, malicious, and defamatory words following, that is to say, "Who stole the parish bell-ropes? How do the ropes wear?" (meaning that the plaintiff had, whilst in his said office of churchwarden as aforesaid, been guilty of stealing ropes), and the said subjects of our said lord the king then understood that that was the meaning of the said words: By means of the committing of which grievance the plaintiff had been and was greatly injured in his good name, fame, and credit, and brought into public scandal and disgrace with and among his parishioners, neighbours, and other good and worthy subjects of this realm, insomuch that divers of those parishioners, neighbours, and subjects to whom the innocence and integrity of the plaintiff in the premises were unknown, had, on the occasion of the committing of the said grievance, from thence hitherto suspected and believed &c. the plaintiff to have been and to be a person guilty of the misconduct and offences imputed to him as well in the said office as otherwise, and had by reason of the committing of the said grievance by the defendant as aforesaid from thence hitherto wholly refused and still did refuse to have any transactions, acquaintance, or discourse with the plaintiff, as they were before used and accustomed to have, and otherwise would have had, &c. &c.

The defendant pleaded not guilty.

At the trial before Patteson, J., at the last Spring Assizes at Exeter, after proof given of the speaking of the words charged, the plaintiff, in order to shew that they were spoken maliciously, offered in evidence the record in

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a former action between the same parties, in which the defendant was charged with having said of the plaintiff, (in relation to the same transaction) that he had, whilst churchwarden, fraudulently sold the parish bell-ropes for a much smaller sum than he had given for them, and had thereby cheated the parish; and in which action the defendant suffered judgment by default, and afterwards, upon the execution of a writ of inquiry, apologised and paid the costs. On the part of the defendant it was contended that this evidence was not admissible. The learned judge, however, received it. It was then contended that it was not shewn that the words spoken of the plaintiff were spoken of him with reference to his office of churchwarden, for that it did not appear either that the plaintiff was churchwarden *at the time of the speaking*, or that the witnesses who proved the words were aware that the plaintiff ever had been churchwarden; and *Sellers v. Killen*, (or *Till*), 7 D. & R. 121, 4 B. & C. 655, and *Ayre v. Craven*, 4 N. & M. 220, 2 Ad. & E. 2, were cited. It was further contended that the words were not in themselves actionable, inasmuch as they did not convey a charge of felony, the parish bell-ropes being by law the property of the churchwarden, and therefore not capable of being the subject of a felony by him.

The jury found that the defendant intended to impute to the plaintiff, that he, whilst churchwarden, stole the parish bell-ropes. A verdict was thereupon taken for the plaintiff on the second count of the declaration; leave being reserved to the defendant to move to enter a nonsuit or a verdict for him, should the court be of opinion that the above objections were well founded.

Erle, in Easter Term last, moved for a new trial on the ground of the reception of improper evidence, for a nonsuit on the points reserved, and also in arrest of judgment.—The record in the former action was improperly

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admitted in evidence. Where the existence or non-existence of malice is doubtful, words spoken or a libel published of the plaintiff at a *subsequent* period have been held admissible to shew malice in the speaking or publishing the words or the libel which form the subject of inquiry (a): but the rule has never been extended to words spoken at a former period. The plaintiff had no right to enhance the damages in this action by giving in evidence another cause of complaint in respect of which he had already received compensation—whether in damages or by an apology, makes no difference.—The words proved impute no felony to the plaintiff; but rather seems to point at an objection to the churchwarden's accounts. Besides, there was no proof that the plaintiff was or ever had been churchwarden. In *Sellers v. Killick*, in an action for words of and concerning the plaintiff as "treasurer and collector" of certain tolls and rates, it appearing that the words were spoken of him in his character of collector only—it was held, that, without due proof of his appointment as collector, pursuant to a private act of parliament, the action was not maintainable, even though he had acted as such collector at the time the words were spoken. [*Bosanquet, J.*—The plea of not guilty admits that fact. The rule of Hilary Term, 4 Will. 4, Case 1, provides, that "in actions of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged."] The plea of not guilty might under that rule operate as an admission

(a) See *Rustell v. Macquister*, 1 Camp. 49, n., and *Tate v. Humphrey*, 2 Camp. 73, n.

of the fact of the plaintiff being churchwarden, if that fact had been expressly alleged in the second count: but it is not so alleged. [*Tindal*, C. J.—Undoubtedly, if there is an express allegation in the declaration that the plaintiff was churchwarden, the plea of not guilty admits that fact. It appears that the fact is expressly alleged in the first count, and that in the second count the words are laid as having been spoken of the plaintiff as churchwarden *as aforesaid*. I think that will do.] The words are not actionable in themselves. In Comyns's Digest, *Action upon the Case for Defamation*, (G. 3.), it is said that, "if the charge be in respect of an office, profession, trade, &c., it must shew his office &c. And generally, it ought to shew that he was in office *at the time of the speaking*: as, if one says of a justice of peace, *he takes bribes*, it must shew that he was *then* in the commission." *Tuthil v. Milton*, Yelv. 158. The action is only maintainable in respect of the injury done to the plaintiff in relation to his office: and the office of churchwarden is not an office in respect of which such an action can be sustained. In *Smith v. Carey*, 3 Camp. 461, in an action for words spoken of the plaintiff in his trade, which may be understood to convey a charge either of felony or of fraud, it was held, that, although the words would be actionable in the latter sense as well as in the former, if the declaration contained an innuendo that the defendant thereby meant to impute felony to the plaintiff, this is material and must be made out in evidence. Here there was nothing to warrant the jury in saying that the defendant intended to impute a felony.

TINDAL, C. J.—I see no objection to the evidence given at the trial touching the conduct of the defendant on the occasion to which that piece of evidence related. It is admitted, and indeed it could not be denied, that words *subsequently* spoken are admissible to shew quo animo the

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defendant spoke the words that are the subject of inquiry. I cannot but think that the previous conduct of the party, or words spoken by him on a prior occasion, would be much more cogent evidence of intent than his subsequent conduct. The evidence in question, being received, shewed an admission by him that the words were untruly and improperly spoken. I therefore think there is no ground for a new trial on that point. The rule, however, may go upon the other points.

BOSANQUET, J.—The cases only shew that the objection has been applied to subsequent words: words spoken antecedently to the words declared on, and with reference to the same transaction, have never that I am aware of been made the subject of contest.

The rest of the court concurring, the rule was granted for entering a nonsuit or for arresting the judgment.

1. As to the nonsuit.

Crowder and *Elliott* shewed cause.—If there was any evidence to go to the jury in support of the second count of the declaration, the plaintiff cannot be nonsuited. The defendant therefore can only avail himself of his objections in arrest of judgment. The second count supports the finding of the jury. [*Tindal*, C. J.—The declaration charges the defendant with having imputed a felony to the plaintiff; and the jury find that the defendant did not intend to impute felony. If the words were spoken of the plaintiff as churchwarden, I should feel great difficulty in saying that they are actionable.] A churchwarden may be guilty of a felony in stealing the parish bell-ropes: they are the property of the parish, and not of the churchwardens, though in indictments they might also be laid to be the property of the latter.—*Rex v. Parker*, 2 East, P. C. 592, 1 Leach, C. C. 320, n.—*Rex v. Hickman*, 2 East, P. C. 593, 1 Leach, C. C. 318. [*Tindal*, C. J.—Bells

and ropes can hardly be called fixtures belonging to the church: they are rather ornaments, in which, though they belong to the parish, the churchwardens have a kind of special property (a).] Before the statute 7 & 8 Geo. 4, c. 29, they could not be the subject of a felony at all: but by the 44th section of that act it is enacted, "that, if any person shall steal or rip, cut, or break, with intent to steal, any glass or wood work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, &c., every such offender shall be guilty of felony, &c." [Parke, J.—Are not the ornaments of the church the property of the churchwardens, and usually so laid in indictments?] They are usually laid to be the property of the parish, and also the property of the churchwardens. A member of a corporation may be guilty of felony in stealing corporate property: so, a man may under certain circumstances commit a felony in relation to his own goods. [Tindal, C. J.—That is, where they are in the possession of a bailee. "If a man doth bail or lend his goods to another, although he hath the general property of them, yet may he commit larceny of them by the felonious taking and carrying them away; and in judgment of law he is said in this case to take the goods of another; for the bailer hath *jus proprietatis*, and the bailee hath *jus possessionis*, or a special property"—3 Inst. 110.] The jury expressly found that the words were spoken of the plaintiff in his office of churchwarden: and they are actionable per se without any inducement, innuendo, or averment of special damage—*Strode v. Homes*, Style, 338. There, Strode brought an action upon the case against Homes for speaking of these words of him in relation of his office, he then being churchwarden of St. Clement's

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(a) See *Hadman v. Ringwood*, Cro. Eliz. 145, 179.

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Parish in Oxford: "Thou art a cheating knave, and hast cosened the parish of 40*l*." Upon not guilty pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment, that the words were not actionable, because here was no special loss alleged by the plaintiff, nor is he in any danger of corporal punishment, by speaking of the words—Pasch. 10 Jac., *Hopper & Baker*. Roll, C. J. answered: The matter is not so much the loss of his office as the loss of his credit in being accompted a cheater. At another day, Crook sen. moved for judgment for the plaintiff, and said the words are actionable, for, a churchwarden is not merely a spiritual officer, but an officer by the common law, and also by the statute—*Yardley v. Ellill*, Hob. 8; *Fleetwood v. Curley*, Hob. 267; *Bray v. Hayne*, Hob. 76. Crook jun., on the other side, urged that this is not an office of profit, but of trouble and burden, and no special loss is alleged. Roll, C. J.—"Officers which have no benefit by their offices have more need to be repaired if they be scandalized in their execution of them; and here the scandal is great loss to an honest man: and what other remedy can he have to repair himself but by his action on the case?" Besides, there was no necessity either for alleging or proving that the plaintiff was churchwarden at the time of the speaking of the slanderous words—*May v. Brown*, 3 B. & C. 113, 4 D. & R. 670; *Lewis v. Walter*, 3 B. & C. 138, n., 4 D. & R. 810. In *Sellers v. Killen*, 7 D. & R. 121, 4 B. & C. 655, and in *Williams v. Stott*, 1 C. & M. 175, unless spoken of the plaintiff in relation to his office or employment, the words conveyed no charge: and in *Smith v. Carey*, 3 Camp. 461, Lord Ellenborough merely held that the plaintiff was bound to shew that the words were spoken in the sense he had ascribed to them. Here, the innuendo does not alter the nature of the offence charged. An innuendo that is repugnant or immaterial may be rejected, where the words are actionable without it—*Corbet v. Hill*,

Cro. Eliz. 609; *Smith v. Cooker*, Cro. Car. 512; *Tomlinson v. Brittlebank*, 1 N. & M. 455, 4 B. & Ad. 630; *Day v. Robinson*, 1 Ad. & E. 554; *Gardiner v. Williams*, 2 C. M. & R. 78. In *Ayre v. Craven*, the words were not actionable per se. It is said that the words here were not shewn to have been spoken of the plaintiff whilst he filled the office of churchwarden, and therefore they are not actionable. It is enough, however, if the words have reference to a time when the plaintiff did fill the office. In *Tuthil v. Milton*, Yelv. 158, it is stated in argument, and assented to by the court, that, "where a man is slandered in his profession or trade, there it need not be so precisely alleged that at the time of the words spoken he was a lawyer, physician, merchant, or linen-draper; but it is sufficient to say that he is of such a trade, and has exercised it for several years past, without saying ultimo or jam elaps.; for, a man shall not be intended to alter his trade or profession, but by presumption he continues it during his life." That case, therefore, does not exactly bear out the position for which it is cited in Comyns's Digest.

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As to the motion for a non-suit.

Sir W. Follett, Erle, and *Newman*, in support of the rule.—The whole evidence shewed that the defendant did not intend to impute felony to the plaintiff: the record of the former action being produced, it appeared that the words there charged merely imputed to the plaintiff his having made an improvident sale of the parish bell-ropes. It is perfectly clear that the plaintiff could not have been guilty of felony in respect of the ropes: the property of them was for the time in himself. In Bacon's Abridgment, *Churchwardens* (B.), it is said—"They have such a special property in the organ, bells, parish books, bible, chalice, surplice, &c., belonging to the church, that, for the taking away, or for any damage done any of these, they may bring an action at law"—"Also they have such

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a special property in the goods of the church, that, when they are stolen, they may bring an appeal of robbery for them." 1 Roll. Abr. *Churchwardens*, 393—Com. Dig. *Ecclesie*, (F. 3)—Hawk. P. C. *Appeals*, s. 44. There was no evidence whatever to shew that the words were spoken at the time the plaintiff was churchwarden, or even that they were spoken of him in relation to the office. To render the words actionable, they must either be spoken of the party in his office, or must impute to him an indictable offence. That the offence here charged, taking the words in their largest sense, is not punishable in the temporal courts, is clear from the case of *Welcomb v. Laka*, 1 Sid. 281. Upon the grounds, therefore, that a felony could not be committed in relation to the subject matter, that the defendant was not proved to have intended to impute either felony or fraud, and that the plaintiff was not shewn to have been in office at the time of the speaking, this action is not maintainable.

Cur. adv. vult.

As to the arrest of judgment.

TINDAL, C. J., now delivered the judgment of the court; In this case the verdict for the plaintiff was given upon the second count of the declaration; and the question before us has arisen on a rule nisi for entering a nonsuit by the leave of the learned judge who tried the cause, or for arresting the judgment. As to the latter ground of the motion, it has been objected by the defendant that the second count of the declaration shews no cause of action, inasmuch as the words therein stated do not impute to the plaintiff the commission of any indictable offence. And we agree, upon the authorities collected by Hawkins, in his Pleas of the Crown, ch. *Appeals*, s. 44, that an indictment for larceny could not be supported against a churchwarden for stealing the bell-ropes of the parish church of which he is churchwarden; for, as it is laid down in that book, he has the *possession* of the goods of the church, in

contradistinction to the *mere charge* of the goods, such as a butler or cook has of his master's goods. At the same time, as the second count of the declaration does not import on the face of it that the churchwarden stole the bell-ropes of the church where he was warden, but generally that he stole bell-ropes, we see no ground for arresting the judgment upon the objection taken to that count.

As to the application, however, for entering a nonsuit, we think the rule must be made absolute. The second count of the declaration contains an averment by way of innuendo, "that the plaintiff, whilst in his said office of churchwarden, had been guilty of stealing ropes, and that the subjects of our lord the king then understood that that was the meaning of the said words." Now, some innuendo was absolutely necessary in this case, in order to make the words actionable; for, the words being put interrogatively, unless there was an averment that they were intended as a charge against the plaintiff, there would be no imputation of a criminal offence having been committed by him; and, in such innuendo, the word "stealing" cannot by any reasonable intendment have any other meaning than that of the commission of the offence of larceny. But the innuendo so stated in the declaration was not only not supported, but was negatived by the plaintiff's own evidence given at the trial; for, in order to prove the malicious speaking of the words in question, the plaintiff produced a judgment which he had obtained in an action against the defendant for slanderous words spoken by the defendant of the plaintiff at a former time, when describing the very same transaction to which the present words relate; in which judgment the words then spoken by the defendant were stated to be, that the plaintiff had fraudulently sold the bell-ropes whilst he was in the office of churchwarden for a much smaller sum than he had given for them, and thereby cheated the parish. This evidence disproved the averment in the declaration that the de-

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defendant intended to charge the plaintiff with stealing the ropes, and shewed conclusively that the defendant had used the word "stealing" in a very different sense from that in which it is generally understood, and in which he in the innuendo averred that it was used; and that the defendant intended only to impute to him that he had defrauded the parish. Upon this ground we think the plaintiff himself shewed that he had no case for the jury, and that a nonsuit must be entered.

Rule absolute for entering a nonsuit.

END OF MICHAELMAS TERM.

MEMORANDUM.

The judges who sat in the court of Common Pleas during the foregoing Term were:—

Lord Chief Justice TINDAL,
Mr. Justice PARK,
Mr. Justice GASELEE,
and
Mr. Justice BOSANQUET.

IN THE COMMON PLEAS.

HILARY TERM, 6 WILL. IV.

BROOKE and Others v. TURNER and Others.

1836.

THE following case was sent by His Honor the Vice-Chancellor for the opinion of the judges of this court:—

Testator devised to his wife and three others, B., C., and D., freehold

lands in trust for his wife for life, and after her decease for the use of his three children for their lives, in equal shares, and to the lawful issue of their respective bodies for their respective lives only, in equal shares, for ever; and, in case of the death of either of his said children without lawful issue, then upon trust for the survivors or survivor of them in equal shares for life only, or to their respective lawful issues in equal shares for life only; and, in case there should be only one child then living, then upon trust for such only child for life only, and for the lawful issue of such only child for life, in equal shares; and if but one issue of such child, then to such only child's issue, for life only, and the heirs of his or her body for ever; but, in case there should not be any lawful issue of such child or the child of such child, then over. Either of the testator's children who should marry was to have power to make a settlement of his share, with the consent of his mother, for the lives of the parties and the lives of their issue, with remainder over in tail. By a second codicil annexed to his will, reciting the above devise, the testator devised the premises after the decease of his wife to B., C., and D., upon trust, for the equal use of his three children as tenants in common for ninety-nine years from the day of his decease, if they or either of them should so long live; and from and after the determination of that term, and in the meantime subject thereto, to the trustees in fee, to preserve contingent remainders; with power to the testator's daughter, if unmarried, to devise one third part in fee or for life; and the uses (subject to those in the codicil declared) which were expressed in the will, as far as the rules of law would permit, were to be carried into perfect execution. By other codicils, C. James and another were appointed trustees in lieu of C. and D. The testator's widow and C. James alone acted in execution of the trusts of the will; and C. James died in the lifetime of the widow, intestate, leaving an eldest son his heir at law. The testator's daughter died unmarried, and, without any reference to the power given her by the will, devised all her then present and future right and interest in the property in question to her mother. The testator's widow by her will, after various devises and bequests, gave and devised the residue of her estate and effects, both real and personal, equally between her grandchildren:—Held, that, under the will and second codicil the testator's three children took estates for ninety-nine years, if they should respectively so long live, as tenants in common, with remainder to the trustees therein named and their heirs during the respective lives of the said three children, in trust to preserve contingent remainders, with remainder to the three children as tenants in common in tail general, with cross-remainders between them in tail general:—Held, also, that the legal estate and interest which the widow had as surviving trustee under the will and codicils at the time of making her will, was an estate for life only; and that upon her death the legal remainder in fee came to the heir at law of C. James, the last surviving trustee of the fee:—Held, also, that the will of the testator's daughter operated as an appointment in exercise of the power over her one-third part of the estate.

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v.
TURNER.

Devise to trustees,

in trust for testator's widow for life,

remainder to his children.

Thomas Brooke, being seised of freehold, leasehold, and copyhold estates, and personal estate and effects, of considerable value, by his will of September, 1807, duly executed and attested, devised to his wife Frances Brooke, H. Bengough, G. Whittington, and S. Rich, his freehold and leasehold estates in Gloucestershire and Wilts, and his houses at Bath, upon trust, immediately after his decease, to sell the same, paying his debts with the proceeds, and the surplus to his residuary legatees: and his manor of Upper Horton, with the rectory, advowson, mansion, lands, and hereditaments thereunto belonging (except the estate called Gyde's Mill), together with his messuages and lands in the parish of Frampton Cotterell, to his wife and H. Bengough, G. Whittington, and S. Rich, and the survivors and survivor, in fee, in trust to permit his wife to receive the rents for her life; and, after her decease, he devised the same property to H. Bengough, G. Whittington, and S. Rich, and the survivors and survivor of them, in fee, expressly as devisees to uses, and not as trustees of the legal estate, upon trust for the use and benefit of his children, Fitzherbert, Thomas, and Frances Elizabeth, for their lives, in equal shares; and to the lawful issue of their respective bodies, for their respective lives only, in equal shares, for ever, and subject to the provisoes and conditions in his will mentioned; and, in case of the death of any or either of his said children without lawful issue, then upon trust for the survivors or survivor of them, in equal shares, for life only, or to their respective lawful issues, in equal shares, for life only: and, in case there should be only one child then living, then upon trust for such only child for life only, and for the lawful issue of such only child for life, in equal shares; and if but one issue of such child; then to such only child's issue, for life only, and the heir of his or her body for ever; but, in case there should not be any lawful issue of such child, or the child of such child, then upon trust

for such person or persons, and for such estate and estates of and in the said hereditaments and premises as his said wife should by deed or will grant or devise the same hereditaments and premises, in such manner and form and for such estate and estates as she should think fit; it being the testator's wish that she should give or grant the same to some of his family: but, in case his said wife should not make any such devise or grant, then, upon trust, and he gave and devised the same hereditaments and premises to and for his nephews Thomas Brooke and William Brooke, sons of his late brothers Richard and William Brooke, and their assigns, for life only; and, on their deaths, to the lawful issue of their respective bodies, as to the share of each of them, for ever, subject to the provisions and conditions therein mentioned. Either of the testator's children who should marry was to have power to make a settlement of his share with consent of his mother, such settlement to be for the lives of the parties and the lives of their issue, with remainder over in tail: in like manner, either of the testator's children was to have power to mortgage his share, but for life only; it being the testator's most earnest request and his express desire to his said children, that they should keep the said manors, lands, rectory, hereditaments, and premises, in his family so long as there should be found one of them living. Gyde's Mill estate the testator gave to his daughter Frances Elizabeth in fee. Then, reciting that in 1805 he had levied a fine of his Lower Horton manor and estate to the use of his will, he declared the use of his will to be to the use of his wife, H. Bengough, G. Whittington, and S. Rich, in fee, upon trust to pay the remainder of his debts, if any; then the annuities thereafter specified; then, subject to such annuities, to permit his wife to receive the rents for life, in case she should retain the name of Brooke; but, in case she should marry, H. Bengough, G. Whittington, and S. Rich to take the same, subject as aforesaid, and

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BRooke
v.
TURNER.

Power to children to make settlements.

Devise of Gyde's Mill to testator's daughter.

Declaration of uses of fine.

1836.

BROOKE
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out of the remainder to pay his wife 500*l.* a year for life, and to divide the residue among his three children during her life, with benefit of survivorship if either should die without issue: and, after the decease of his wife, to H. Bengough, G. Whittington, and S. Rich, in fee, in trust to preserve contingent uses, and then subject as therein mentioned to the same limitations to the same persons, and with the same powers and provisos, as were expressed in regard to the Upper Horton estate; it being again stated that the testator's most earnest request and express desire to his children was, that they should keep the said manor, lands, tenements, rectory, tithes, hereditaments, and premises in his family so long as there should be found one of them living. The remainder of his property the testator devised to his wife, H. Bengough, G. Whittington, and S. Rich, their heirs, executors, and administrators, upon trust to pay debts and expenses, the remainder to be divided among his wife and children. The testator made his wife sole executrix of his will.

First codicil—
revocation of
the devise of
Gyde's Mill.

By a codicil, of May, 1811, the testator revoked his devise of Gyde's Mill, and gave his daughter Frances Elizabeth certain lands in Frampton Cotterell: and, after reciting, that, by an indenture of May, 1808, he had given Gyde's and some other land to his wife and to his son Fitzherbert for life, he confirmed that indenture, and, after the decease of his wife and son, directed that Gyde's should be taken as part of his residuary property.

Second codicil.

By a second codicil, of July, 1811, after reciting the devise in the will after the decease of his wife, of the manor, lands, and hereditaments of Upper Horton, and of the lands in Frampton Cotterell, and the gift, after the decease of his wife, of the Lower Horton manor and estate, the testator, after the decease of his wife, devised his said manors, hereditaments, and premises, unto the said H. Bengough, G. Whittington, and S. Rich, and their heirs, upon the trusts and to and for the intents and pur-

Devise of Lower
Horton estate
in trust for the
children of tes-
tator for 99
years, &c.

poses following, viz. to and for the equal use and behoof of his said three children, Fitzherbert, Thomas and Frances Elizabeth, as tenants in common, for the term of ninety-nine years, to be computed from the day of his decease, and fully to be complete and ended, if his said three children, or either of them, should happen so long to live; and, from and immediately after the determination of the said term, and in the meantime subject thereto, to H. Bengough, G. Whittington, and S. Rich, in fee, to preserve contingent uses and remainders—with power to his daughter, if unmarried, to devise one third in fee or for life, but, if she married, any such devise was to be void: and the uses (subject and in subserviency to those in that codicil declared) which were expressed and contained in his said will, as far as the rules of law would permit, were to be carried into perfect execution.

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Power to testator's daughter to devise.

By a third codicil, of 1812, the testator revoked all the devises to Rich, as a co-trustee with Bengough and Whittington, and substituted C. James for Rich.

Third codicil.

By a fourth codicil, of 1813, the testator revoked all the devises to Whittington, and substituted G. Rolph, as a trustee in his place.

Fourth codicil.

The testator died in September, 1813, and left the said Frances Brooke, his widow, and three children, viz. Fitzherbert, his eldest son and heir-at-law, Thomas, and Frances Elizabeth Brooke, all since deceased, him surviving. The said Frances Brooke duly proved the said will and codicils in the Prerogative Court of Canterbury. The said Frances Brooke and C. James (who died in her lifetime, on the 5th July, 1818,) alone acted in the execution of the testator's will and codicils; and, by a deed-poll bearing date the 8th May, 1815, which was duly executed by the said G. Rolph and H. Bengough, the said G. Rolph and H. Bengough disclaimed all their right, title, and interest, in and to the real and personal estates devised to them as aforesaid by the testator's will; and they

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 tor's daughter.

the said G. Rolph and H. Bengough respectively died in the lifetime of the said Frances Brooke. The said C. James survived the said G. Rolph and H. Bengough, and died intestate, leaving an eldest son, his heir-at-law. Frances Brooke continued the widow of the testator until the time of her decease. The said Frances Brooke and C. James, shortly after the testator's death, sold the said freehold and leasehold estates situate in the county of Gloucester, in Thomas Street in the city of Bristol, and the houses in Queen Square in the city of Bath and parish of Walcot, devised in trust for sale as aforesaid; and with the produce of such sale and the personal estate of the testator paid all his debts, funeral, and testamentary expenses; and the said Frances Brooke duly paid and satisfied the said annuities respectively charged upon the estates at Horton and Frampton as long as the same continued payable. The testator was not at the time of making his will and first and second codicils; and of his death, seised of any hereditaments and premises in the parish of Frampton Cotterell other than those devised by the first codicil to Frances Elizabeth Brooke in fee simple. The said Frances Elizabeth Brooke, the daughter of the testator, continued unmarried to the time of her death; and, at the time of her making her will, she had not any property in the parish of Upper Horton other than the said manor and estate of Upper Horton. She duly made her will, bearing date the 23rd April, 1816, which was executed and attested so as to pass real estates by devise; and thereby she gave and devised all her then present and future right and interest in and to the messuages, farms, lands, hereditaments, and premises in the manor and parish of Upper Horton, in the county of Gloucester, and also all her messuages, lands, hereditaments, and premises in Chipping Sodbury and Frampton Cotterell, in the same county, and all her personal estate, unto her mother, Frances Brooke, her heirs, executors, and administrators.

She died on the 25th of May, 1820. The said Fitzherbert Brooke, son and heir-at-law of the testator, on the 29th of March, 1810, intermarried with Theresa Frances Anstey, who died on the 6th March, 1830; and there was issue of such marriage five children and no more, viz. Fitzherbert Huntly, his eldest son and heir-at-law, who was born on the 5th November, 1815—the defendant Richard Brooke; now Richard Brooke Jones, who was born on the 8th July, 1816, and became, on the death of the said Fitzherbert Huntly Brooke, the heir-at-law of the testator—the defendant Theresa Frances Cox. Brooke, who was born on the 18th December, 1810—the defendant Frances Sarah Brooke, who was born on the 4th February, 1812—and the defendant Lucy Lucinda Brooke, who was born on the 20th March, 1818. The said Fitzherbert Brooke died in March, 1825, and left his said five children him surviving. The said Fitzherbert Huntly Brooke, the eldest son of the said Fitzherbert Brooke, died on the 15th November, 1830, an infant, and unmarried. The said Thomas Brooke, the son of the testator, had four children, and no more, viz. Thomas Richard Brooke, the plaintiff, who was born the 16th June, 1811—the defendant Isabella Frances Brooke, who was born on the 9th May, 1807—and the defendant Elizabeth Brooke, who was born on the 6th September, 1812. And the said Thomas Brooke, the son of the testator, died in February, 1830.

Frances Brooke, widow of the testator, being seized of divers freehold estates in fee simple, duly made her will, bearing date the 29th September, 1830, which was executed and attested so as to pass freehold estates by devise; and thereby, first, she ordered all her debts and funeral and testamentary expenses to be fully paid, and, after devising several of her freeholds as therein mentioned, and giving various specific and pecuniary legacies, gave, devised, and bequeathed all the rest, residue, and remainder of her estate and effects, both real and personal

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(except as thereafter otherwise disposed of), unto all her said grand-children equally between them, and their several heirs, executors, and administrators, as tenants in common. She died on the 20th February, 1832; and the grand-children who survived her were the defendants Richard Brooke Jones, her heir-at-law, Theresa Frances Coxe Brooke, Frances Sarah Brooke, and Lucy Lucinda Brooke, the children of the said Fitzherbert Brooke, and the plaintiff Thomas Richard Brooke, and the defendants Isabella Frances Brooke and Elizabeth Brooke, none of whom had ever been married.

- First question. The questions for the opinion of the court were—First, what estate the said testator's three children, Fitzherbert, Thomas, and Frances Elizabeth Brooke, took under the said will and first and second codicils of the testator in the Upper Horton manor and estate—Secondly, whether the said Fitzherbert, Thomas, and Frances Elizabeth Brooke respectively took any and what estates under the testator's will and first and second codicils in that part of the Upper Horton estate called the Mill Farm, formerly Gyde's, and in the part also called Gyde's Mill—Thirdly, whether the plaintiff Thomas Richard Brooke and the defendant Richard Brooke Jones respectively were entitled to any and what estate and interest in the said Upper Horton manor and estate and the said Mill Farm, or any and what parts thereof, under the said will and first and second codicils, and in any and what character—Fourthly, whether the defendants Theresa Frances Coxe Brooke, Frances Sarah Brooke, Lucy Lucinda Brooke, Isabella Frances Brooke, and Elizabeth Brooke, or any and which of them, were entitled respectively, under the said will and first and second codicils of the testator, to any and what estates and interest in the said Upper Horton manor and estate and the said Mill Farm, or any and what part thereof—Fifthly, what legal estate and interest the said Frances Brooke had, as the surviving trustee under the said will and codicils of the testator in the Lower Horton estate, or in any and what
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- Third question.
- Fourth question.
- Fifth question.

part thereof, at the times of making her will and death, and in whom such estates and interest vested upon her death—Sixthly, whether the will of the said Frances Elizabeth Brooke operated as an appointment in exercise of her power over her one third part of the Upper Horton manor and estate—Seventhly, whether, upon the death of Frances Brooke, the heir-at-law of C. James had any and what legal estate under the said will and codicils of the testator in the Lower Horton estate, or in any and what part thereof—Eighthly, whether any and what estates and interest in the Upper Horton manor and estate passed under the residuary devise in the testator's will.

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Sixth question.

Seventh question.

Eighth question.

The case was argued in Trinity Term last.

Preston, for the plaintiff Thomas Richard Brooke.—

1. The first question is, what estates the testator's three children took under the will and first and second codicils in the Upper Horton estate. It cannot be denied that by the second codicil they took estates for ninety-nine years, as tenants in common, if they should so long live, with remainder to the trustees therein named, and their heirs, during the respective lives of the testator's children, in trust to preserve contingent remainders; but by the will and codicils together, the children took as tenants in common in tail general, with cross-remainders between them in tail general. That the testator intended to do that which he could not legally do, is clear: his evident desire was, to create successive life estates ad infinitum. But the utmost that the law allows is, a devise to a living person for life and to his or her unborn son for life: all beyond is bad for perpetuity (a). In *Hodgson v. Ambrose*, 1 Doug.

First question.

(a) An executory devise is good if it must of necessity take place within the compass of a life or lives in being and twenty-one years afterwards, although such term be in gross and not measured with reference to the infancy of

any person; and an additional period will be allowed for gestation in cases where gestation exists, but not otherwise—*Cadell v. Palmer*, 10 Jarman's Conveyancing, 43, 3 M. & Scott, 571; *Bengough v. Edridge*, 1 Sim. 173.

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357, it was held, that, if there is a devise to A. and the heirs of his body, and, "for want of such issue," to B., and A. dies before the testator, leaving issue, such issue shall take nothing, and the limitation to B. shall not be construed as an executory devise, but shall vest in possession as an immediate estate on the testator's death. The general rule in the construction of a will is, that such construction shall be put upon it as will give the utmost possible effect to all and every the devises contained therein—*Gallini v. Doe d. Gallini*, 4 N. & M. 894: and, where there are inconsistent devises, the court will always, in the construction of the will, look to the general intention of the testator. In *Mortimer v. West*, 2 Sim. 374, upon a devise to A., B., C., &c., share and share alike, for their lives, remainder to their respective children for their lives, and so to be continued, from issue to issue, for life, but, if any of them die leaving no issue, their shares to go to the survivors for their lives, and the issue of such of them as should be dead, and for default of any issue, then over—it was held that A., B., C., &c., took estates tail, with cross-remainders. *Seaward v. Willock*, 5 East, 198, 1 Smith, 390, and *Humberstone v. Humberstone*, 1 P. Wms. 332, were cited in *Mortimer v. West*, and will probably be relied on by the defendants in this case. In *Seaward v. Willock*, under a devise "to A. for life, and after him to his eldest or any other son after him for life, and after them to as many of his descendants' issue male as shall be heirs of his or their bodies down to the tenth generation, during their natural lives"—it was held that A. took no more than a life estate; for, there was no general intent to create an estate tail, as contradistinguished from the particular intent to give an estate for life to the first taker; but a single intent to create a succession of life estates to persons not in esse, which the law will not allow. The life estates were perpetual, so as to run through the whole series. That case, therefore, can have

no application here. And in *Humberstone v. Humberstone*, it was held that estates tail were created; and the only question was as to when they should commence. It was the case of an executory trust; and the court framed for the testator such a will as he would have framed for himself had he possessed equal knowledge with the court.

2. The devise of Gyde's Mill to the testator's daughter, Frances Elizabeth Brooke, being revoked by the first codicil, the children took the same estates in that part as they took in the rest of the Upper Horton estate; it being clearly the testator's intention that they should go together.

[As to the third and fourth questions, it was contended that the parties respectively took nothing in law under the will and first and second codicils.]

5. The legal estate and interest which Frances Brooke had as surviving trustee, under the will and codicils, was an estate in fee: a less interest would not enable the trustees to carry into effect the intention of the testator. If a chattel interest only had passed, it would merge in the estates for life, and be extinguished. The appointment of the wife of the testator as a trustee, by the will, is not expressly revoked by the fourth codicil. Had it been competent to the testator to declare an use, beyond all doubt he would have vested the fee in the trustees. He could not, however, in point of law, do so; and therefore the trustees took nothing under the fine. Uses may be declared by any instrument antecedently to the levying the fine: but, *after* the fine has been levied, the uses can only be declared by a *deed*. The 4 Ann. c. 16, s. 50, contains a legislative declaration that nothing less than a deed will do: the doubt that previously existed was, whether a deed subsequently executed was sufficient. And, on the death of Frances Brooke, all her interest in the property in question passed to her grandchildren as tenants in common. General words will pass all the legal estate the testator has, unless by the context, or by special limitations

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introduced into other parts of the will, an exception is created—*Braybrook v. Inskipp*, 8 Ves. 417; *Ex parte Morgan*, 10 Ves. 101. 6. The will of Frances Elizabeth Brooke can have no effect unless it be held to be an exercise of the power of appointment conferred upon her by the second codicil; which it clearly was not.—The seventh and eighth questions were not discussed.

W. H. Watson (who appeared for Richard Brooke Jones, the eldest surviving son of Fitzherbert Brooke, the son and heir at law of the testator, who claimed in the same interest with the party represented by Mr. Preston) was merely permitted to cite cases. He cited the following:—*Robinson v. Robinson*, 1 Burr. 48; *Doe d. Blandford v. Applin*, 4 T. R. 82; *Doe d. Candler v. Smith*, 7 T. R. 531; *Doe d. Cotton v. Stenlake*, 12 East, 515; *Doe d. Gallini v. Gallini*, 5 B. & Ad. 640, 2 N. & M. 619; *Murthwaite v. Jenkinson*, 2 B. & C. 357, 3 D. & R. 765; and *Mandeville's case*, Co. Litt. 26. b.

First question.

Bompas, Serjeant, for Isabella Frances Brooke and Elizabeth Brooke, the two daughters of Thomas Brooke, the son of the testator.—1. The three children of the testator, Fitzherbert, Thomas, and Frances Elizabeth Brooke, took under the will and first and second codicils only an estate for ninety-nine years, if they should so long live, as tenants in common; and the fee was vested in the trustees named in the third and fourth codicils, for life; with remainder to the children of the testator's three children, in tail, with cross-remainders between them. The intention of the testator must undoubtedly prevail as far as the rules of law will permit. The will gives the fee to the trustees (including the wife) and their heirs, in trust to permit the wife to hold during her life; and the children, at her decease, were to become tenants in common for a term which was to last as long as the life of the longest liver of them. The limitation

to the grand-children comes within the rule in *Shelley's* case, according to which, if a devise is made to A. for life, and, from and after his decease, to the use of his heirs, or the issue of his body, A. takes an estate tail. But here the devise for life to the children being revoked, the rule in *Shelley's* case cannot apply: the children took merely an equitable estate for years under the second codicil, and their children, consequently, the first estate tail. The life estate given by the will is irreconcilable with the chattel estate given to the children by the second codicil, and is necessarily revoked by it: and a chattel interest cannot by any implication be converted into an estate tail. In *Mogg v. Mogg*, 1 Mer. 655, the testator devised certain freehold estates to all and every the child and children of his daughter S. M. for life, and, after the decease of such child and children, to the lawful issue of such child and children to hold to such issue, his, her, or their heirs, as tenants in common; and, in default of such issue, then over to other persons: it was held that the children of S. M. living at the testator's death took under this devise as tenants in common in tail, with cross-remainders. But there, the testator's grand-children were clearly the first takers of an estate of freehold. 5(b). The second codicil gives all the legal estate in the Lower Horton estate, after the death of the widow, to the three trustees named in the third and fourth codicils: and, in order to enable them to support the contingent remainders, it was requisite that the legal estate should vest in them, and be taken out of the widow, as to the devise to whom in the will the codicil necessarily operates a revocation.

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Fifth question.

Hayes, for Theresa F. C. Brooke, Frances S. Brooke, and Lucy L. Brooke, the three daughters of Fitzherbert, the testator's son, cited *Doe d. Long v. Laming*, 2 Burr.

(b) The parties for whom Bompas appeared were not interested in disputing any other of the questions than the first and fifth.

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1100, 1 W. Bl. 543; *Somerville v. Lethbridge*, 6 T. R. 213; and *Beard v. Westcott*, 5 Taunt. 393, 5 B. & A. 801.

Preston, in reply.—The intention of the testator is plain, that, should one of the three children die, his share should go to his children, and not to the survivors. According to the construction contended for on the other side, supposing the grand-children to have died in the life-time of the children, the devise to the former would have lapsed; which would altogether have defeated the intention of the testator. No new estate is given (except by implication) to the grand-children by the second codicil. Upon the question of revocation, *Arnold v. Congreve*, 1 Russ. & Mylne, 209, is precisely in point. There, a testatrix, having a son and two daughters, gave 6000*l.* 3*l.* per cent. stock to her son for life, remainder (as to one moiety of it) to his eldest male child living at her decease; and, as to the other moiety, to his other children; she also gave 6000*l.* like stock to her daughters for their respective lives in equal shares, remainder to their children; and a sum of Bank stock to her three children in equal shares during their lives, the share of each at his or her death to revert to their issue in equal shares: subsequently she made a codicil, in which she desired that her grand-children's shares of these two stocks should be settled upon them for their lives, and afterwards upon their children: it was held, that, by the operation of the codicil, the moiety of 6000*l.* 3*l.* per cent. stock, which by the will was given absolutely to the eldest male son of the testatrix's son living at her death, was well limited to that male child for life, with remainder to his children; that, as to all the other bequests, the attempt to extend the limitations to great-grand-children was ineffectual; and that the absolute interests given to the grand-children were not destroyed or restricted by the codicil.

The following certificate was in the course of the present term transmitted to the Vice Chancellor:—

“ We have heard this case argued by counsel, and have considered it; and, in answer to the several questions submitted to us, we are of opinion—First, that, under the said will and the first and second codicils, the three children of the testator took in the Upper Horton manor and property estates for the term of ninety-nine years, if they should respectively so long live, as tenants in common, with remainder to the trustees in the second codicil named, and their heirs, during the respective lives of the said three children, in trust to preserve contingent remainders, with remainder to the said three children as tenants in common in tail general, with cross-remainders between them in tail general—Secondly, we are of opinion that the three children of the testator took, under the will and the first and second codicils, the same estate in the Mill Farm (in the will called Gyde’s Mill,) as they took in the Upper Horton estate—Thirdly and fourthly, we are of opinion that the grandchildren named in the third and fourth questions respectively took nothing under the will and first and second codicils in the said Upper Horton manor and estate, or the said Mill Farm—Fifthly, we are of opinion that the legal estate and interest which Frances Brooke had as surviving trustee under the will and codicils of the testator in the Lower Horton estate at the time of making her will, was an estate for life only; and that, upon her death, the legal remainder in fee came to the heir-at-law of C. James, the last surviving trustee of the fee—Sixthly, we are of opinion that the will of Frances Elizabeth Brooke did operate as an appointment in exercise of the power over her one third part of the Upper Horton manor and estate—Seventhly, we are of opinion, that, on the death of Frances Brooke, the heir-at-law of C. James took the legal estate in fee in the Lower Horton estate—Eighthly, we are of opinion that no part of the Upper

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Second.

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Sixth.

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Horton manor and estate passed under the residuary devise in the testator's will.

" N. C. TINDAL.

" J. A. PARK.

" S. GASBLEE.

" J. VAUGHAN."

Monday,
Jan. 11th.

An affidavit verifying the certificate of acknowledgment by a married woman under the 3 & 4 Will. 4, c. 74, cannot be received if sworn in Ireland before a commissioner for taking affidavits in the Common Pleas in Ireland: it must be sworn before a commissioner of this court.

In re ANDERSON'S Acknowledgment.

BY the 3 & 4 Will. 4, c. 42, s. 42, it is enacted "that the Lord High Chancellor, lord keeper, or lords commissioners of the great seal, the superior courts of law at Westminster, and the several judges of the same, shall have such and the same powers for granting commissions for taking and receiving *affidavits* in Scotland and Ireland *to be used and read in the said courts respectively*, as they now have in all and every the shires and counties within the kingdom of England, and dominion of Wales, and town of Berwick-upon-Tweed, and the Isle of Man, by virtue of the statutes now in force."

By the act for the abolition of fines and recoveries, 3 & 4 Will. 4, c. 74, s. 79, it is enacted "that every deed to be executed by a married woman for any of the purposes of that act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced or acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as thereafter provided." By section 81, it is enacted, "that, for the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Jus-

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tice of the court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removeable at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and kept by the officer of the court of Common Pleas at Westminster with whom the certificates of the acknowledgment of married women are to be lodged as thereafter mentioned," &c. And by section 83, "that, in those cases where, by reason of residence beyond seas (a), or ill health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge or a master in Chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any persons therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid," &c. By section 84, the form is given of a memorandum and certificate of the taking of the acknowledgment to be signed by the person taking the acknowledgment (with power to this court from time to time to alter the form of the memorandum (b); which certificate, together

(a) As to whether Ireland is for the purposes of this act *beyond the seas*, see the judgment of this court in *Battersby v. Kirk*, post.

(b) The 89th section of the 3 & 4 Will. 4, c. 74, further enacts "That the court of Common

Pleas at Westminster shall also from time to time make such orders and regulations as the court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under the act, and touching the

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with an affidavit by some person verifying the same and the signature thereof by the party by whom the same shall purport to be signed, is, by s. 85, required to be lodged with the proper officer of this court—"and such officer shall examine the certificate, and see that it is duly signed, either by some judge or master in Chancery, *or by two commissioners appointed pursuant to this act*, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and, if all the requisites in this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said court of Common Pleas."

In this case the affidavit verifying the certificate of acknowledgment taken in pursuance of the act, was sworn in Ireland, not before a commissioner appointed for taking affidavits in *this* court, there having been no such commissioners appointed for Ireland under the 3 & 4 Will. 4, c. 42, s. 42; but before a commissioner for taking affidavits in the court of Common Pleas in Ireland (c). Mr. Sherwood, the officer appointed by the court to file the certificates and affidavits under the 89th section of the 3 & 4 Will. 4, c. 74, having declined to receive the certificate and affidavit in question, on the ground that the latter was not sworn before a person properly qualified—

particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place," &c. Vide Reg. Gen. Michaelmas Term, 4 Will. 4, 3 M. & Scott, 871; and Reg. Gen. Hilary Term, 4 Will. 4, 4 M. & Scott, 115, which gives the form

of the affidavit of verification now in use, which is required to be made "by some practising attorney or solicitor, and to be sworn before a judge of the court of Common Pleas, or a commissioner appointed for taking affidavits in the said court."

(c) See Sharp v. Johnston, ante, p. 405.

Kaye moved that he might be directed to file them.—It appeared that the party resided at the distance of upwards of one hundred miles from Dublin. *Kilby v. Stanton*, 2 Y. & J. 75, where an affidavit sworn before a commissioner of the Court of Exchequer in Ireland was permitted to be read in the Exchequer Chamber here, was cited and relied on.

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TINDAL, C. J.—The statute and the rules of court made in pursuance thereof require the affidavit of the taking of the acknowledgment to be sworn before a judge of this court or a commissioner appointed for taking affidavits in this court. The affidavit in this case is a mere nullity: perjury could not be assigned upon it (*d*). If there is no commissioner for taking affidavits to be used in this court in the neighbourhood of the party's residence, any proper person who applies will have a commission granted to him.

The rest of the court concurring—

Kaye took nothing.

(*d*) In *Rex v. Verelst*, 3 Camp. 432, it was held, that, upon an indictment for perjury before a surrogate, the fact of the person who administered the oath *having*

acted as a surrogate, is sufficient prima facie evidence of his being duly appointed, and having authority to administer the oath.

*See Webb v. Austin
8 Luth. R.R. 416*

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IN THE COMMON PLEAS,

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WHITTON v. PEACOCK and Another.

J. S. being possessed of an equitable estate in certain property, by indenture dated in 1762, demised a portion thereof to K. for ninety-eight years at the yearly rent of 5*l.*, and by another indenture of the same date demised other part of the premises to K. for the like term and at the like rent. J. S., having afterwards acquired the legal estate, by indenture dated in 1773—reciting the two indentures of 1762, and that the parties had come to a further agreement respecting the property whereby they had agreed that K. should have the whole of the premises leased to him at the yearly rent of 10*l.* only; but, instead of cancelling the two several leases already granted of part, they should remain, and another lease be granted

BY order of the Master of the Rolls, the following case was submitted for the opinion of this court:—

The parcels of land, called Hornsey Lane Field, comprised in the leases hereinafter stated, were copyhold of inheritance of the manor of Hornsey in the county of Middlesex. Before the 15th of March, 1755, Elizabeth Benett, who held the said premises to her and her heirs, died seised thereof, having made her will dated the 18th of June, 1753, whereby she gave and devised all the residue of her estate of what nature or kind soever (under which devise the premises in question were included) unto her nephew Benett Garrard; but the said E. Benett did not surrender the said premises to the use of her will, or make any surrender whatsoever. At a court holden for the said manor on the 15th of March, 1755, the said Benett Garrard was admitted tenant, to hold unto the said Benett Garrard, his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor. At the same court the said Benett Garrard, surrendered the same premises to the use of Bendall Martyn, his heirs and assigns, according to the custom of the said manor; and the said Bendall Martyn was admitted tenant and surrendered the same to the use of his will. On the 11th of March, 1761, the lord of the said manor granted a licence to the said Bendall Martyn to demise the said premises from Christmas then last, for the term of ninety-nine years, or for any less term. Before the 13th of April, 1762, the said Bendall Martyn died, seised of the premises; and by

of the residue of the property at the ground-rent of 10*l.*, which rent should be considered the same as the two several rents of 5*l.* each so reserved by the leases of 1762; and that notwithstanding such several reservations no more than 10*l.* per annum in the whole should be payable for the entire premises—devised to K. the whole of the premises except such parts as had already been demised to him by the indentures of 1762, for the same term; K. covenanting for himself, his executors, administrators, and assigns, to pay the rent and keep the premises in repair—Held, that the assignee of the reversion could not maintain an action of covenant against the assignees of K. for breach of the covenants contained in either of the leases of 1762.

his will, bearing date the 25th of March, 1760, gave and devised the same unto Maria, the wife of Baker John Littlehales, to hold to her, her heirs and assigns, for ever. At a court holden for the said manor on the 18th of April 1762, the said Maria Littlehales was admitted tenant, to hold the premises unto the said Maria Littlehales, her heirs and assigns for ever, at the will of the lord, according to the custom of the said manor. And at the same court, the said B. J. Littlehales and Maria his wife surrendered the premises to the use of the said B. J. Littlehales, his heirs and assigns, for ever; whereupon the said B. J. Littlehales was admitted tenant. By an indenture of lease, bearing date the 2nd of August 1762, made between the said B. J. Littlehales and Maria his wife of the one part, and Philip Keys, builder, of the other part, it was witnessed, that the said B. J. Littlehales and Maria his wife, in pursuance and in part performance of a prior agreement, and by virtue of the aforesaid licence by the said B. Martyn obtained of the lord of the said manor for that purpose, demised to Keys, his executors, administrators and assigns, a piece of ground, parcel of the said premises, to hold the same to Keys, his executors, administrators, and assigns, from Lady-day, 1761, for ninety-eight years then next ensuing, paying to Littlehales, his heirs and assigns, the yearly rent of 5*l*. And by the said lease Keys did for himself, his executors, administrators, and assigns, covenant with Littlehales, his heirs and assigns, that Keys, his executors, administrators, and assigns, should pay to Littlehales, his heirs and assigns, the said yearly rent of 5*l*, on the day and in the manner therein appointed for payment; and that Keys, his executors, administrators, and assigns, should finish, fit for habitation, within six months from the date thereof, the messuage and tenement, erections and buildings, then standing on the premises thereby demised, and sufficiently repair and uphold the same during the said term; and the same premises so well and sufficiently repaired and upheld at the end or

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other sooner determination of the term aforesaid, should surrender and yield up unto Littlehales, his heirs and assigns. By another indenture of lease of the same date, made between Littlehales and Maria his wife of the one part, and Keys of the other part, Littlehales and Maria his wife, in pursuance of the said licence, demised another piece of ground, parcel of the said premises, to Keys, for a similar term, under the rent of 5*l.*, and under covenants similar to those in the last stated lease. By an indenture of assignment, bearing date the 20th of August, 1762, and made between Keys of the one part, and David Main therein described of the other part, Keys assigned the several pieces of ground comprised in the said indentures of lease of the 20d. of August, 1762, and the messuages or tenements built thereon, to Main, for the residue of the said term of ninety-eight years, by way of mortgage, and subject to redemption on payment of 400*l.* and interest on the 20th of February then next ensuing. By an indenture bearing date the 31st of March 1766, and made between Main of the first part, Keys of the second part, and John Carter therein described of the third part, Main at the request of Keys, and Keys, did assign the same pieces of ground and the two messuages built thereon to Carter, for the then residue of the said term of ninety-eight years, subject to a proviso for redemption of the said premises on payment by Keys to Carter of the principal sum of 307*l.* 10*s.* and interest on the 30th of September then next ensuing. At a court holden for the said manor on the 23rd of May, 1770, it was found by the homage, and was entered and appeared in the Court Rolls of the manor, that the said Elizabeth Benett then some time since died seised of the premises to which she had been admitted at the Court held on the 27th of April, 1758, without having made any surrender to the use of her will; and that Martha Leigh, wife of Peter Leigh, who was the niece and customary heir of the said Elizabeth Benett, was admitted tenant, to hold the premises unto the said Martha

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Leigh, her heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor. At a court held for the said manor on the 13th of February, 1772, Martha Leigh, and on the 19th of the same month, Peter Leigh, surrendered the premises to the use of Littlehales, his heirs and assigns, for ever, according to the custom of the said manor; whereupon Littlehales was admitted to the premises, to hold unto him, his heirs and assigns, according to the custom of the said manor. By an indenture of lease, bearing date the 3rd of July, 1773, made between the said Littlehales and Maria his wife of the one part, and Keys of the other part—reciting the said two indentures of lease of the 2nd of August, 1762; and reciting that the said parties to the said indentures of lease and to the now recited indenture had come to a further agreement respecting the said field called Hornsey Lane Field, whereby they had agreed that Keys should have the whole of the said field leased to him, at the yearly rent of 10*l.* only, and no more; but, instead of cancelling the two several leases already granted of part thereof, and thereinbefore recited, the same leases should remain, and another lease be granted of the residue of the said field at the yearly ground rent of 10*l.*, which rent should be considered the same as the two several rents of 5*l.* each so reserved by the said two leases as aforesaid; and that, notwithstanding such several reservations, no more than to the amount of the yearly rent of 10*l.* in the whole should be payable for the said field and the messuages and tenements erected and built thereon—it was witnessed, that, in pursuance of such last-mentioned agreement, and by virtue of the said license, and in consideration of the yearly rent and covenants thereafter reserved, they, Littlehales and Maria his wife, did lease to Keys, his executors, administrators, and assigns, the said close or field called Hornsey Lane Field, except such parts of the said field as had already been demised to Keys

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by the two several indentures thereinbefore recited: to hold the said close or field (except as aforesaid), and all and singular other the premises thereby demised; with the appurtenances, unto Keys, his executors, administrators, and assigns, from Lady-Day, 1761, for the term of ninety-eight years from thence next ensuing; yielding and paying for the first two years of the said term the rent of a pepper-corn; and also yielding and paying to Littlehales, his heirs and assigns, for the residue of the term the yearly rent of 10*l.*: And Keys did thereby, for himself, his executors, administrators, and assigns, covenant with Littlehales, his heirs and assigns, to pay the rent during the term, and keep the premises in repair. The indenture contained a proviso, that, if the said yearly rent of 10*l.* should be unpaid by the space of thirty days next after any of the days of payment, it should be lawful for Littlehales, his heirs and assigns, to re-enter. There was a covenant on the part of Littlehales, his heirs and assigns, for quiet enjoyment; and a proviso that the yearly rent of 10*l.* thereby reserved was meant and intended to be and was the same as the two several yearly rents of 5*l.* each so respectively reserved by the said two several indentures of lease thereinbefore recited; and that no more than the yearly rent of 10*l.* should be paid or payable for the whole of the said field called Hornsey Lane Field.

By various surrenders and admittances, the customary estate of Littlehales and Maria his wife in the said premises became vested in the plaintiff in this cause, who, at a court holden for the said manor on the 6th May, 1833, was admitted to the same, to hold to her, her heirs and assigns, according to the custom of the manor.

Question.

The question for the opinion of the court was—whether the plaintiff could maintain an action of covenant against the Keyses for breach of the covenants contained in the above-stated leases of August, 1762, or either of them.

The case was argued in Trinity Term last.

Talfourd, Serjeant, for the plaintiff.—The plaintiff is in a situation to maintain an action for breaches of the covenants contained in the deeds of August, 1762. Two questions arise in this case, the affirmance of either of which will entitle the plaintiff to judgment—first, whether the plaintiff, being assignee of Littlehales, can under the circumstances sue the defendants—secondly, whether the recital in the lease of July, 1773, which declares that the two leases of the 2nd August, 1762, shall remain, and by which one entire rent is to be paid in respect of the whole premises, does not amount to a covenant on the part of the lessees in that lease to keep the covenants contained in the recited leases. 1. No doubt, the original lessee would be estopped from disputing the title of the lessor. But the question is, whether that estoppel so binds the land as to entitle the assignee to sue in respect of it: and if it does not bind the land, whether the leases of 1762 did not become good leases in interest when the lessor acquired the legal estate, so as to entitle the assignee to sue thereon. That the assignee of the lessor is estopped, is clear from the authorities: and it is equally clear that the original lessee would be bound by the estoppel. The confusion in the cases has arisen from considering this as a question of pleading. In *Palmer v. Ekins*, 2 *Ld. Raym.* 1550, *Str.* 817, it was held that a lessee by indenture cannot plead, even against an assignee, anything which is tantamount to pleading that the lessor had no interest in the premises when he made the lease. That case proceeded upon the ground that the estoppel bound the land. The same point was determined in *Parker v. Manning*, 7 *T. R.* 537, where it was held, that, in an action of covenant for rent on an indenture brought by the assignees of the lessor (a bankrupt), the lessee cannot plead that the lessor *nil habuit in tenementis*. There is in principle no distinction between that case and the present, which is the very converse of it. Estoppels are mutual. Thus, in *Omelaughland v. Hood*,

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4 Bac. Abr. 194, *Leases and Terms for Years* (O) it is said: "If A. mortgages lands to B. upon condition to re-enter on payment of 10*l.*, and after A., before the day of payment is come, being in possession, makes a lease for years by indenture to C., and then after performs the condition, this shall make the lease to C. good against himself by estoppel; and it was further adjudged, that even the feoffee of A. shall be bound by this lease, which took its effect only at first by estoppel; because he coming in under one who was estopped, should be himself estopped likewise, which was still a stronger case than the first. And this was adjudged in Ireland, and afterwards affirmed on a writ of error here, and seems a very reasonable judgment; for, if a subsequent purchase shall make good a lease of lands by indenture, though the lessor had nothing in those lands at the time of the lease, and therefore his lease at first could only take effect by estoppel; much more in this case, where the lessor had a possibility of coming into the lands again, shall his performance of the condition after make good the intermediate lease. And so it should seem too if the condition were broken at the time of the lease, so as he had then nothing but an equity of redemption; yet, if he should after be admitted to redeem in Chancery, this would make good the intermediate lease which took effect at first only by estoppel"—Roll. Abr. 874, 876. The same principle is laid down in *Trevian v. Lawrence*, 6 Mod. 256, 1 Salk. 276, 2 Ld. Raym. 1036, where *Holt*, C. J., says (6 Mod. 258): "When an estoppel runs upon the land it alters the interest of it; for, if a man by deed indented make a lease of Dale, reserving rent, in which at that time he has nothing, and afterwards he purchases Dale, and bargains and sells it to a stranger, the bargainee shall hold it liable to the first lease, and, coming under him who made the lease, shall be estopped to say that the bargainor had nothing to let in the premises at the time of the lease made; for, this estoppel runs

upon the land and alters the interest of it." Co. Litt. 47. b., is an authority express as to the lessee: "If the lease be made by deed indented, then are both parties concluded; but, if it be by deed-poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made. A., lessee for the life of B., makes a lease for years by deed indented, and after purchases the reversion in fee. B. dieth; A. shall avoid his own lease, for he may confess and avoid the lease which took effect in point of interest, and determined by the death of B. But if A. had nothing in the land, and made a lease for years by deed indented, and after purchase the land, the lessor is as well concluded as *the lessee* to say that the lessor had nothing in the land; and here it worketh only upon the conclusion, and the lessor cannot confess and avoid, as he might in the other case." "Et videtur, that, by purchase of the land, that is turned into a lease; in interest which before was purely an estoppel"—Hal. MSS. In 1 Williams's Saunders, 325, n., where the authorities are collected and commented upon, it is said: "It is not merely matter of form to conclude an estoppel with relying upon it. For, by not doing so, the party may often lose that advantage of the estoppel which the law gives him. As, where, in debt for rent on a demise by indenture by one who has nothing in the land, the defendant pleads nil habuit in tenementis, if the plaintiff replies that he had a sufficient estate to make the demise, he loses the benefit of the estoppel; but, if he replies that the lease was made *by indenture*, and concludes unde petit judicium if the defendant shall be admitted to plead the plea against his own acceptance of the lease by indenture, the defendant shall be stopped. But, where the declaration states the lease to be by indenture, the defendant need not reply the estoppel, but may demur, because the estoppel appears on the record: otherwise, as is before mentioned, if the declaration be 'quod cum demisisset,' without say-

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ing that it was by indenture." So, in 2 Wms. Saund, 418*a*, n(1): "Where the grantor or lessor *has nothing* in the lands at the time of the grant or lease, and therefore no interest passes out of him to the grantee or lessee by the grant or lease, but the title begins by the estoppel which the deed creates between the parties, such estoppel runs with the land, into whose hand soever it comes, whether heir or assignee. As, if a man makes a lease of D. by deed, in which *he has nothing*, and afterwards purchases D. in fee, and suffers it to descend to his heir, or conveys it away to A. in fee, the heir or assignee shall be bound by this estoppel, and so shall the lessee and his assignees. And this distinction seems to reconcile all the cases." *Whaley v. Anderson*, 1 Keb. 874, is to the same effect. From all these authorities it is clear that the original lessee would be estopped from saying that the lessor had no title: and the assignee of the lessee is equally estopped: for, in *Taylor v. Needham*, 2 Taunt. 278, it was held that an assignee of a lease by indenture is estopped by the deed which estops his assignor, therefore he cannot plead non demisit; but that, if an estate be created by deed poll, *ne lessa*, *ne granta*, *ne chargea*, *ne enfeoffa*, *ne dona*, &c., are good pleas for a stranger to the deed. [*Tindal*, C. J.—How would you declare where the lessor was a perfect stranger?] Relying upon the lease by estoppel. 2. The lease of 1773 amounts to an express covenant on the part of Keys, the lessee, to keep the covenants in the leases of 1762; or, at all events, an agreement under seal to confirm the former leases. In *Saltoun v. Houstoun*, 1 Bing. 433, 8 Moore, 546, Lord Gifford says: "The court must look at the whole of the instrument, and if they find it contains a clear agreement to do any act, whether in the way of covenant, provision, or even exception, then it is clear that an action of covenant may be maintained on the instrument." And in *Sampson v. Easterby*, 4 M. & R. 422,

9 B. & C. 505 (a), in a lease by B. to A. for an undivided third part of a mine *with the appurtenances*, a recital that A had agreed with B. and with C. and D., the other owners of the mine, to erect a smelting house on a waste not demised and not shewn to belong to B. or to B. C. and D., was held to raise a covenant by implication between A. and B. for the erection of such mill; and also that such covenant ran with the land and passed with the assignee of the reversion of B.'s purparty of the mine.

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Wightman, contra.—The lessors in the leases of 1762 having only an equitable title, the covenants entered into by the lessee are merely covenants in gross, and do not run with the land, and therefore convey no right in respect of which the assignee of the reversion can sue. The lessee and all claiming under him are undoubtedly estopped from denying the right of the lessor to grant the lease; but they are not estopped from saying that his interest has expired, or that he had no such interest as to which he could convey to the assignee of the reversion a right to sue. There is no privity of contract: and the statute 32 Hen. 8, which annexes the privity of contract to the privity of estate, and enables the assignee of the reversion to sue on contracts made by his predecessor, confers that right only upon the assignee of the legal title. In 1 Wms. Saund. 233 a, n. (2), it is said: "Where the plaintiff declares in covenant upon a demise by himself, he is not obliged to set out any title to the lands &c. demised, but may begin his declaration with stating that 'whereas by a certain indenture he demised' &c. 1 Str. 230, 231, *Alcherry v. Walby*; Carth. 32; Lib. Plac. 97; Lib. Ent. 130, 141. But, in an action by an assignee of the reversion, he must set out the title of

(a) Affirmed on error in the Exchequer Chamber. See 4 M. & P. 601, 6 Bing. 645.

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the lessor to the demised premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plaintiff—Clift's Ent. 218; pl. 7; Lil. Ent. 132, 135." This case therefore is clearly distinguishable from *Palmer v. Ekins* and *Parker v. Manning*. In *Carvick v. Blagrove*, 4 Moore, 803, 1 B. & B. 513, in covenant by the assignee of a lessor against the lessee for rent arrear, an allegation that the lessor was possessed for the remainder of a term of twenty-two years, commencing on &c., was held to be material and traversable. Dallas, C. J., in delivering the judgment of the court there, distinguishes that case from *Palmer v. Ekins*, and says: "If the effect of a plea is to dispute the interest which a lessee took under a lease from a lessor, the plea is bad, whatever shape it assumes. The present plea leaves the lease in the same state as the plaintiff has described it: and the defendant merely objects that the title he has alleged as being assigned to him was not the true title." *Webb v. Russell*, 3 T. R. 393, as to this point, must govern the present case. It was there held that if mortgagor and mortgagee make a lease in which the covenant for payment of rent and for repairs are only with the former and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to the grantor's interest in the land, and therefore do not run with it. [*Tindal*, C. J.—In that case the lease was made by a termor who afterwards acquired the fee, and thus the term became merged.] Here, at the time the leases of 1762 were made, the lessor was a stranger to the estate. 2. It would be an extraordinary extension of the doctrine of implied covenants, to hold that an action of covenant will lie on the lease of 1773, for breaches of the covenants contained in the leases of 1762. A covenant in one lease to perform the covenants contained in another lease, is a collateral covenant or a covenant in gross, and not a covenant that runs with the land. Besides, this is not a

covenant between two parties who had power to cancel the leases of 1762: those leases were at the time outstanding in the hands of a mortgagee. The case cited from *Bac. Abr.* is clearly distinguishable from the present. The assignee of the reversion is estopped from denying that the assignor had title; but the assignee of the lessee is not so estopped as against the assignee of the lessor.

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Talfourd, Serjeant, in reply.—In *Webb v. Russell* no estoppel could exist in relation to the subject matter: and the other cases cited are disposed of by the distinction suggested by Mr. Serjeant Williams in 2 *Wms. Saund.* 418 *a.* The fact of the leases of 1762 being at the time outstanding in the hands of a mortgagee, can make no difference.

The following certificate was in the course of the present term transmitted to his Honor:—

“ We have heard this case argued by counsel, and have considered it, and we think the plaintiff cannot maintain an action of covenant against the assigns of Philip Keys for breach of the covenants contained in either of the leases of the 2nd August, 1762.

“ N. C. TINDAL.

“ J. A. PARK.

“ S. GASELEE.

“ J. VAUGHAN.”

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Wednesday,
Jan. 13th.

TARPLEY, Clerk, v. BLABY.

In an action for a libel, the defendant cannot, either in bar of the action or in mitigation of damages, give in evidence other libels published of him by the plaintiff, unless such libels are of a prior date and relate distinctly to the subject matter of the libel declared on.

To prove the publication by the defendant of a libel on the plaintiff contained in a letter printed in a newspaper, a manuscript of the defendant, through several passages of which the editor had before it was composed drawn his pen, was produced. The printed libel, being also produced, was found to correspond exactly with the unobliterated parts of the manuscript. The portions of the manuscript through which the pen was

drawn were of a more libellous tendency than the parts published in the newspaper, and did not in any degree qualify them:—Held, that the manuscript was receivable in evidence, the portions that corresponded with the printed libel to prove the publication by the defendant, and the residue to shew *quo animo* that libel was published.

Held, also, that a letter addressed by the defendant to the plaintiff about the same period, containing expressions similar to those found in the printed libel, was also admissible to shew *quo animo* the libel was published.

LIBEL.—The first count of the declaration, after the common inducement, stated, that the plaintiff, before and at the time of the committing the several grievances thereafter mentioned, had been and was &c. a clerk in holy orders, and vicar of the parish of Floore in the county of Northampton, and had resided and still resides in the said parish; that the defendant, long before and at the time of the committing the said grievances thereafter mentioned, had resided and still resides in the same parish of Floore; that the plaintiff, before and at the time of the committing the grievances thereafter mentioned, was and still is one of his majesty's justices of the peace in and for the said county of Northampton: yet the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to cause it to be believed that the plaintiff was a bastard son of a peer of this realm, and had been guilty of the offences and misconduct thereafter mentioned, and to vex, harass, impoverish and wholly ruin him, theretofore, to wit, on the 24th November, 1832, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning the plaintiff, and of and concerning the plaintiff as such vicar of Floore as aforesaid, in a certain newspaper called The Northampton Free Press, in a certain letter purporting to be addressed by the defendant to the plaintiff, a false, scandalous, malicious, and defamatory libel, which said false, scandalous, malicious, and defamatory libel was as follows:—"Rev. Sir—In consequence of our accidental

meeting on the highway (to which one of your provincial duties is closely attached) I feel myself bound to compliment you upon the very gentlemanly salutation you was pleased to greet me with, and also to greet you with a hearty welcome to all the well-merited replies you received in return for all the genteel compliments you paid me, more especially as coming from so pure and inspired a mouth. The first part of your first classical compliment I venerate—'old'—as being beholden to a bountiful and merciful Providence for so distinguished a blessing; but your subjunct—'vagabond'—as I do you, I heartily despise." [The writer, after giving his definition of the term "vagabond," and retorting it upon the plaintiff, proceeded thus:] "And, again, let it be observed by you (meaning the plaintiff), your flippant object, vagabond, rarely issues from such a stock as mine. My father and mother were both acknowledged, and were known to be sober, honest, industrious, and fixed residents in society; lawfully married; and their children all legitimately born and honestly reared: therefore, upon a proper occasion, dare to look you in the face with as much confidence as though they were lords' bastards (thereby meaning the said plaintiff, and that he the said plaintiff was the bastard son of a peer of this realm). As to how far it may concern you in any degree I know not; nor do I care: I have the whole population for a great length of time to appeal to for my social, friendly, humane deportment, and integrity; and can and will bear me out in and with quite as great respectability and credit as you are ever likely to obtain from the gun, the fox-brush, the legal stool, the turnpike road, or perhaps the desk." [After some further abuse, in the course of which the plaintiff was charged with having mutilated the list of voters for the county of Northampton, told that his "vanity outstripped his divinity," called "hypocrite," and likened to Judas, the libel concluded as follows]—"Why do you (meaning the plaintiff) lay so powerful a stress

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upon misrepresentation? Does your memory fail you? or do you or I mistake the term? Was it for misrepresentation you attended a court of justice? Was it not for misrepresentation that a jury convicted and a judge condemned you in 50*l.*, to pay for that suit, besides the gold fringe trimmings? I have not yet called you a misrepresenting vagabond, because you should be a pure and holy parson. You called me a misrepresenting 'vagabond;' and that was the mildest term you could afford me; because you wanted to persuade yourself I told you a political lie. I don't tell you what *you* are; but ask, what are you? A justice of the peace, a turnpike road commissioner, a licensed game killer, a hark-away fox hunter, and, last, a parson!"

The second and third counts were for parts of the same libel, with some additions. The libel charged in the fourth count was—"Bastard Tarpley"—innuendo, meaning the said plaintiff, and thereby meaning that the said plaintiff was a bastard: in the fifth count—"Hang-dog Tarpley"—innuendo, meaning the plaintiff, and thereby meaning that he the plaintiff had wilfully and maliciously hanged a dog or dogs belonging to some other person or persons: in the sixth count—"Cut-tree Tarpley"—innuendo, meaning the plaintiff, and thereby meaning that he the plaintiff had wilfully and maliciously cut the tree or trees of some other person or persons: and in the seventh count—"Break-window Tarpley"—innuendo, meaning the plaintiff, and thereby meaning that he the plaintiff had wilfully and maliciously broken the window or windows of some other person or persons.

Special damage.

By means of the committing of which said several grievances by the defendant, he the plaintiff had been and was greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours and other good subjects of the realm, inasmuch that one J. N. Esq. and one E. B. Esq.,

who during all the time aforesaid were and still are justices of the peace in and for the said county of Northampton, and divers other persons, who had by means and from the time of the committing the said grievances by the defendant, suspected and believed and still do suspect and believe the plaintiff to be a bastard and to have been guilty of the offences and misconduct thereinbefore mentioned, and had by reason thereof from thence hitherto wholly refused and still do refuse to transact business with the plaintiff as a justice of the peace or otherwise, or to have any acquaintance and discourse with the plaintiff as they were before used and accustomed to have and otherwise would have had: to the plaintiff's damage of 1000*l*.

The defendant pleaded first, not guilty—secondly, a justification as to so much of the libel set forth in the first and third counts as related to the alleged mutilation of the list of voters, stating that the plaintiff illegally and improperly did mutilate and alter the said list of voters, and did illegally and improperly insert in the said list, opposite to the name of one Samuel Roddis, a voter therein mentioned, the words, "Freehold land in Floore field, occupied by self," thereby meaning to assert and have it believed that the said Samuel Roddis was the proprietor and occupier of certain lands in the parish of Floore; whereas in truth and in fact the said Samuel Roddis had not at the time of such insertion, and was not the proprietor and occupier of, any land in the said parish of Floore, nor had he any land there in possession, reversion, or expectancy; and did also illegally and improperly alter the qualifications of certain voters as inserted in the said list, &c. &c. The third plea justified so much of the libels in the declaration mentioned as charged the plaintiff with having been guilty of vulgarity and unseemly conduct towards the defendant, in charging the defendant with being a liar and an old vagabond, and also so much of the said libels as charged the plaintiff with having been a licensed killer of game, and a fox hunter.

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The fourth plea, in justification of the libel in the fifth count, stated that the plaintiff, on the 1st January, 1832, wrongfully, unlawfully, and maliciously did hang and cause to be hanged the dog of a certain person, to wit one W. Marriott. The fifth plea, in justification of the libels in the sixth and last counts, and of so much of the libels in the second count as charged the plaintiff with nightly despoiling his neighbours' property, stated that the plaintiff, on the 1st January, 1832, and on divers other times between that day and the publishing of the last-mentioned libels, that is to say, in the night time, did maliciously break and cause to be broken divers, to wit, twenty windows of the defendant, then being a neighbour of plaintiff, and divers, to wit, twenty windows of a certain other person, to wit, one Richard Pack, then being a neighbour of the plaintiff; and also maliciously cut and grubbed up and caused to be cut and grubbed up divers, to wit, fifty trees and fifty shrubs of the said Robert Pack, &c. &c.

Upon each of these pleas the plaintiff took issue.

The cause was tried before Tindal, C. J., at the Sittings at Westminster after the last term. The plaintiff is the vicar of Floore near Northampton. The defendant an aged individual resident in the same parish. The libel set forth in the first count was published in the Northampton Free Press on the 24th November, 1832. The words stated in the last four counts were chalked by the defendant on boards and gates in the neighbourhood. To prove that the defendant was the author of the libels set forth in the first three counts, the plaintiff produced a letter in the handwriting of the defendant. This letter contained the whole of the matter set out in the first count, together with the additional matter stated in the second and third counts, such additional matter being struck through with a pen, but still legible. The letter was found in the month of January, 1833, at the house which at the time of the publication of the libel had been

occupied by the editor of the Northampton Free Press, by a person who went to look over the premises, they being then to let; and the alterations appeared to have been made by the editor, and consisted in the expunging of some of the most objectionable passages, without in any way varying the effect of the portions that were not obliterated. The printed libel corresponded with the un mutilated parts of the manuscript. The defendant was proved to have been in communication with the editor of the Northampton Free Press about the time of the publication of the libel. The plaintiff produced another letter addressed to himself, containing many of the passages that appeared in the printed libel, and the body of which was in the defendant's handwriting, but the signature had been obliterated, and afterwards re-written by the plaintiff. There was no evidence that this letter had ever been seen by any one: but a servant of the defendant's who was called stated that in the course of 1832, the defendant gave him a letter to take to the plaintiff, the contents of which letter, he, the witness, was ignorant of.

On the part of the defendant, these two letters were objected to as not admissible in evidence; the first on the ground that, admitting the manuscript to be the defendant's, he gave no authority for its publication in the form in which it appeared, and therefore was not responsible for it; and the other on the ground that, the time of its delivery not appearing with any degree of certainty, it was not sufficiently connected with the libellous publication. His lordship allowed both these letters to be read, the former (as far as it corresponded with the printed libel) as evidence of the publication by the defendant, the latter (together with the unprinted portions of the first letter) to shew quo animo the libel was published.

For the purpose of reducing the damages, the defendant gave in evidence a libel on himself, written by the plaintiff and printed in the Northampton Free Press of

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the same date with the libel set out in the first count. He also proved that the plaintiff, whilst the libels charged in the last four counts were in course of publication, had written in chalk upon the gate of a person named Wilding, in reference to the defendant—"Oxford Bob," and "Cod-fish." He further produced in evidence a paper bearing date the 8th September, 1892, purporting to be a copy of a letter written by the defendant, for election purposes, headed in the plaintiff's handwriting—"Copy of a letter written by that lying old vagabond Robert Blaby, to Sharpe, the infidel barber at Northampton, with its original bad grammar and false spelling. N. B. Not intended by the writer for public inspection." At the end of the letter (which was picked up at the White Hart Inn at Floore), in the plaintiff's handwriting, were the words "Oxford Bob, alias Cod-fish." The landlord of the White Hart proved that the plaintiff admitted to him that he had called the defendant an old vagabond, and said, that, if the defendant had not been an old man with one foot in the grave, he would have knocked his teeth down his throat. The defendant then proceeded to prove that the plaintiff had also circulated of him the following libel:—"The following verses were found in a village about seven miles from Northampton, and are supposed to refer to the expected death of a notorious old scoundrel living in it, and intended for his epitaph:—

"Here lies old Oxford Bob, a noted liar,
 Waiting the vengeance of eternal fire.
 His numerous crimes, what mortal tongue can tell:
 Rogue, cheat, hypocrite, vagabond, and infidel."

This last libel not appearing to be in any way connected with the libels published by the defendant on the plaintiff, and the witness called to prove the publication being unable to speak to the time within a twelve-month, his lordship, on the authority of *May v. Brown*, 8 B. & C. 113, 4 D. & R. 670, declined to admit it. His lordship also

refused to permit another witness (who was in court during the discussion) to be called to supply the date.

A verdict having been found for the plaintiff, damages 40s.—

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Adams, Serjeant, now moved for a new trial on the grounds that evidence had been admitted which ought to have been rejected, and that evidence had been rejected which ought to have been admitted. The libel set forth in the first count was not authorized by the defendant; the publication was the act of the editor of the paper. In *Adams v. Kelly*, R. & M. 157, in order to shew that a defendant had caused and procured a printed libel to be inserted in a newspaper, a reporter to a public newspaper proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the defendant for the purpose of such publication, and that the newspaper then produced was exactly the same, with the exception of one or two slight alterations, not affecting the sense: it was held that what the reporter published in consequence of what passed with the defendant, might be considered as published by the defendant, but that the newspaper could not be read in evidence without producing the written account delivered by the witness to the editor. The second letter had no connection whatever with the libels declared on, and therefore ought not to have been received. Then, with respect to the libel which was not received in evidence—The authority of *May v. Brown* was acquiesced in at the trial: but on the same day on which this cause was tried, Lord Denman, sitting in the King's Bench at Nisi Prius, seems to have thrown doubt upon that case: his lordship admitted general evidence to be given, in mitigation of damages, of libels published by the plaintiff on the defendant. [*F. Kelly*, Amicus Curie, observed, that, in the case alluded to (in which he was counsel), the libels offered

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in evidence on the part of the defendant appeared to be connected with the libel which was the subject of the action.] In *May v. Brown*, the libels of which evidence was held inadmissible were of a date subsequent to the libel declared on. Whereas here it appeared that the plaintiff and defendant had for a long period been mutually libelling each other. Had this evidence been admitted the defendant could only have had a verdict for a farthing; and in that case his lordship would doubtless have certified. At all events, the additional witness, who would have supplied the date, ought to have been examined.

TINDAL, C. J.—It appears to me that no sufficient ground has been shewn to induce the court to grant a rule in this case. The grounds taken are—first, that evidence was improperly received at the trial on the part of the plaintiff—secondly, that other evidence tendered on the part of the defendant was improperly rejected: and if any doubt existed in the minds of the court on either point, a rule ought to be granted. With regard to the supposed improper reception of evidence, the first objection is that a letter in the handwriting of the defendant, and found in the house of the plaintiff, and as to which there was reasonable evidence that it had been brought there by a servant of the defendant, ought not to have been received. Another objection is, that the original document from which the libel set forth in the first count of the declaration was printed was not receivable, because it had been altered by the editor of the newspaper, and therefore did not to the full extent correspond with the printed libel. As to the latter objection, which it may be more convenient to dispose of first, the evidence was, that the defendant was in communication with the editor of the Northampton Free Press in the month of August, 1832; that, shortly afterwards, the house that had at that period been occupied by the editor being to let, an individual who

went to look over it found a paper, in the defendant's handwriting, which appeared to be the original manuscript from which the libel in question had been composed, through certain parts of which manuscript (though the whole was still legible) a pen had been drawn; the parts not so obliterated corresponding with the published libel. This, it is said, was not evidence to prove a publication of the libel by the present defendant. It appears to me, however, that the omission by the editor of the more offensive parts of the libel did not make the publication of the less offensive parts any the less the act of the defendant. If the editor had in the publication omitted portions of the letter that had a tendency to qualify or give a materially less offensive meaning to those portions which were published, the case would have been different. But, if we are allowed to form any conjecture upon the subject, we could not entertain a doubt but that the editor, though willing to encounter the hazard of giving publicity to the less offensive parts of the libel, did not think it right to make himself a party to the propagation of the grosser parts of it. I therefore think that this part of the objection is answered. With regard to the other objection to the admissibility of the evidence in question—I agree that the time of the delivery of the letter did not very accurately appear: but it did appear that a letter similar to that in question had been delivered at the plaintiff's house by a servant of the defendant in the course of the year 1832; and that in this document (which was in the defendant's handwriting) were passages that exactly coincided with the manuscript found at the printing-office, and with the libel printed in the newspaper. How could I, where doubt was suggested as to the publication of the libel by the defendant, refuse to receive in evidence this letter, which was contemporaneous with the publication complained of, to shew quo animo the alleged libel was published. I allowed so much of

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the letter as agreed with the printed libel to be read as evidence of the fact of publication, and the residue to shew quo animo the libel complained of was published. And I am not aware that this course was at all objectionable.

With regard to the evidence supposed to have been improperly rejected—Evidence was offered on the part of the defendant to shew that the plaintiff had libelled him, and so given such a degree of provocation as either justified the publication of the libel published by the defendant in the Northampton Free Press, or at all events disentitled the plaintiff in this action to damages. In the newspaper which contained the last-mentioned libel was also a letter written by the plaintiff containing offensive and injurious imputations upon the defendant. So far the evidence tendered was admitted: the jury had that letter before them. Other evidence was offered, to shew a series of offensive publications in the shape of placards and writings on boards and gates, wherein each party reflected upon the character of the other. In order to let in this description of evidence, it appeared to me to be necessary, upon the true construction of *May v. Brown*, to see that these libels so published by the plaintiff were at least antecedent in point of date to the libels published by the defendant, so as in some way to connect themselves with them. Lord Chief Justice Abbott there says (3 B. & C. 124—6): "The evidence offered at the trial was of particular libels alleged to have been published and distributed by the plaintiff. It was not contended that any one of those libels could be said to be the provocation of the particular libel of which the plaintiff complains. I thought that unless it could be made to appear that the libels offered in evidence related to the same subject as the libel on which the action was brought, I ought not to receive them as evidence. It is not contended that they do distinctly relate to the same subject

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as the libel on which the action is brought. It must now be taken that they do not. Then it comes to this single question, whether, when one man brings an action against another for libelling him, it is competent for the other to shew, that, as to other subjects, the plaintiff has published libels on him." And, after adverting to the inconvenience of allowing such evidence, his lordship adds: "It seems to me that it is not a just ground for mitigating damages in an action brought for one libel, that on other occasions the plaintiff has written libels on the defendant on some other matter unconnected with that which is the subject of the action. It would be a set-off of one libel against another." The rule laid down in *May v. Brown* must therefore be taken with that qualification. And I do not perceive that the ruling of Lord Denman in the unreported case mentioned in the course of the argument at all militates against the doctrine we are now acting upon. There was no evidence to shew that the chalking on the gates by the plaintiff could have given rise to the placards exhibited by the defendant. The witness who was called on this point on the part of the defendant was unable to speak to the fact within a twelve-month. I rejected the evidence because it appeared upon the whole that the transactions it referred to took place at a time posterior to the committing of the grievance complained of. It is said that the defendant's counsel proposed to call another witness; but that I refused to allow it. If that witness was intended to be called for the purpose of fixing the time after the objection had been argued, it is possible I might have thought him not admissible to contradict the preceding witness. The point was not pressed: at least, I have no definite recollection upon the subject. I adopted what I conceived to be the ordinary course, and, in the exercise of my discretion, rejected the evidence: and upon consideration I am not inclined to alter my opinion. The question, after all, seems to me merely

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to be whether or not the damages shall be reduced to a farthing. We ought to feel very strongly that justice has not been done between the parties before we grant a new trial in such a case. My impression at the trial was such, that, had the jury given only a farthing damages, I rather think I should have declined to certify; but should under the circumstances have suffered the burthen to fall as the law had cast it.

PARK, J.—One of the objections taken on the part of the defendant to the admissibility of the letter found at the editor's house was, that a pen appeared to have been run through certain parts of the manuscript; and it was contended that therefore the editor was alone responsible for the libel that appeared in the newspaper, and not the defendant, the writer of the original document. I do not at all accede to that proposition: it is entirely unsupported by authority. Besides, the argument assumes a fact of which there was no proof whatever, viz. that the erasure was the act of the editor. If that individual had expunged from the letter matter tending to qualify its libellous tendency, the question would have been different; but, that not being so, it appears to me that the defendant is not exonerated by what has been done. I am also of opinion that the defendant's letter was properly admitted for the purpose of shewing the animus of the publication. The principle laid down in *May v. Brown* stands wholly uncontradicted. It was in confirmation of the doctrine held by Sir James Mansfield in *Finnerty v. Tipper*, 2 Camp. 72, and itself received confirmation in *Wakley v. Johnson*, R. & M. 422 (a); and, according to Mr. Kelly's statement, Lord Denman seems in the later case that has been mentioned, to have taken the same view of the subject that Lord Tenterden, then Lord Chief Justice Abbott, took in *May v. Brown*. If the evidence tendered

(a) And see *Stuart v. Lovell*, 2 Stark. 93.

on the present occasion went to shew that the libels complained of by the plaintiff were the result of the provocation arising out of those published by him reflecting upon the defendant, it would have been admitted. Upon the whole, I think no rule should be granted.

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GASELEE, J.—I am of the same opinion. It appeared from the evidence that the principal libel complained of was published in a newspaper from a manuscript of the defendant which was at a subsequent period found at the house that had been occupied by the editor of the paper; and it further appeared that the manuscript so found corresponded in many passages with another letter which was proved to have been delivered at the plaintiff's house by a servant of the defendant. The manuscript found at the editor's contained the whole of the printed libel, and something more, which had been struck out with a pen; but there was no evidence to shew that this was done by the editor. Assuming, however, that it was so, provided the parts so struck out did not qualify or remove the sting of the libel, the defendant would not be the less responsible for that portion of the libel that was put in circulation. The rule is well established, that libels published by the plaintiff of the defendant of an earlier date and in direct relation to the libel declared on, may be given in evidence for the purpose of reducing the damages. Libels published by, wholly unconnected with that published of, the plaintiff, or published at a subsequent period, do not fall within the rule.

BOSANQUET, J.—I am also of opinion that no rule should be granted in this case. Assuming that those parts of the writing which did not appear in the printed libel were struck out by the pen of the editor of the newspaper, and without the knowledge or consent of the defendant; still, as the omitted parts contained nothing calculated to qualify or diminish the libellous tendency of

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the published portions, the defendant is not the less answerable for that which has been published. If I employ another to do an illegal act, with aggravating circumstances, I am not the less responsible because he thinks proper to omit the aggravation. The letter of the defendant was properly admitted—that portion of it which corresponded with that which appeared in the newspaper to prove the writing and publication of the libel by the defendant, the remainder to shew *quo animo* the published portion was written. Then, with respect to the evidence that was rejected—The Lord Chief Justice acted upon the authority of *May v. Brown*. His lordship's attention does not appear to have been called at the trial to the distinction between libels published by the plaintiff at a period prior or subsequent to the libel declared on. The rejection of the evidence does not appear to me to afford any ground for granting a new trial. This is at best a mere attempt to reduce the damages to a farthing: and his lordship says, that, if the jury had confined their verdict to that sum, he would not have been disposed to certify.

Rule refused.

Thursday,
 Jan. 14th.

ABBOTT and Another, Assignees of FLUDE, a Bankrupt,
 v. BURBAGE and Others.

F. & S., traders
 in partnership,
 being in insol-
 vent circum-
 stances, entered

THIS was an action of trover brought by the plaintiffs as assignees of one Flude, a bankrupt, to recover from the F. & S., traders in partnership, being in insolvent circumstances, entered into a deed of composition with their joint creditors whereby they engaged to pay them 4s. 6d. in the pound upon the amount of their respective debts, by three instalments, F. & S. retaining possession of the stock in trade, and the creditors engaging to release them on payment of the last instalment. By the same deed F. assigned to the trustees a policy of assurance upon his life (which constituted his entire separate property), in trust to pay out of the proceeds the balance of the debts due to the joint creditors, and the surplus if any to his, F.'s, personal representatives. Two years after the date of the assignment a fiat issued against F. In an action brought by the assignees under the fiat against the trustees named in the deed, to recover the policy, S. who was called as a witness, stated that at the time of the execution of the deed his partner and himself entertained hopes of retrieving themselves:—Held, that the assignment of the policy under these circumstances did not constitute an act of bankruptcy:—Held, also, that it was properly left to the jury to say whether the deed was honestly and bona fide entered into for the purpose of enabling F. & S. to continue to carry on their trade, or with intent to defeat or delay any particular class of creditors; or whether the deed was voluntary and a fraudulent preference given by F. to the assignees of the firm.

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defendants the value of a policy of insurance effected on the life of Flude for 3000*l.* with the Atlas Insurance Company. The cause was tried before Tindal, C. J., at the Sittings in London after the last term. The facts were as follow:—In the year 1831, and for some years prior to that date, Messrs. Flude & Simpson carried on in partnership the trade of wine merchants in Mincing Lane, London. In December in that year, finding themselves to be in insolvent circumstances, they called a meeting of their joint creditors, and, communicating to them their embarrassed state, proposed that the separate property of Flude should be assigned to trustees in trust for the benefit of the creditors of the firm. A deed of assignment was accordingly entered into, under which it was stipulated that Flude & Simpson should be permitted to carry on the business, retain the stock in trade, and pay 4*s.* 6*d.* in the pound to the creditors (meaning the joint creditors of the firm), by three instalments, at three, six, and nine months' date; the creditors agreeing to release them on payment of the composition. By this deed Flude assigned to the trustees (the defendants) the policy in question, which constituted the whole of his separate estate, in trust for the joint creditors, that they might receive out of the produce thereof upon the death of Flude the residue of their respective debts, the surplus (if any) to be handed over to his personal representatives. Flude at this time owed separate debts to a considerable amount. Flude & Simpson continued to carry on their business for some time, and paid the first and second instalments, but failed in payment of the third. A commission of bankrupt issued against Flude towards the close of 1833. At the trial the question was, whether or not the execution of the above deed constituted an act of bankruptcy by Flude, as being an assignment of all his separate property for the benefit of the joint creditors of the firm, in fraud and delay of Flude's separate creditors. Simpson, who was called as

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a witness, stated, that, at the time the deed was executed, his partner and himself had hopes of retrieving themselves.

His lordship left it to the jury to say whether the deed was honestly and bona fide entered into for the purpose of enabling Flude & Simpson to continue to carry on their trade, or with intent to defeat or delay any particular class of creditors; or whether the deed was voluntary and a fraudulent preference given by Flude to the joint creditors of the firm. The jury returned a verdict for the defendants.

F. Kelly now moved for a new trial, on the ground of misdirection. It was not enough in a case like this to leave it dryly to the jury to say whether the deed was honest or fraudulent, which they would understand to mean merely honest or fraudulent in point of fact: their attention should have been called to the circumstances of the parties at the time of its execution. If the facts had appeared upon a special case, they would clearly be sufficient to establish an act of bankruptcy. This was within the meaning of the 6 Geo. 4, c. 16, s. 3, an assignment with intent to defraud certain creditors. [*Tindal*, C. J.—Is not the intent a question for the jury?] Undoubtedly it is: but the jury ought in such a case to be informed that the effect of the transaction was such that the law would infer the intent to be fraudulent. When a man in a state of declared insolvency assigns for the exclusive benefit of one class of his creditors the only property of any value that he possesses, his intent necessarily must be to defraud or defeat and delay the claims of his other creditors. Here the effect of the instrument was to sweep away the whole of Flude's separate property for the sole and exclusive benefit of the creditors of the firm. In *Morgan v. Horseman*, 3 Taunt. 241, 1 Rose, 334, it was held that a deed whereby a debtor, being pressed, conveyed estates

in trust to sell and to pay the pressing creditor, with a further trust to pay his debts to certain relatives in order to give them an undue preference, in contemplation of bankruptcy, is an act of bankruptcy. *Linton v. Bartlett*, 1 Wils. 47, is to the same effect. [*Bosanquet, J.*—In both those cases the assignor *contemplated* bankruptcy.] This assignment being made whilst the parties are in a state of such absolute insolvency as appeared in this case, it must be taken to have been made in contemplation of bankruptcy. It was admitted that bankruptcy was inevitable unless the creditors assented to the proposed arrangement. At all events, the state of the parties should have been submitted to the jury as one ingredient to aid them in coming to a conclusion. Where in contemplation of law an assignment is fraudulent and voluntary, in order to its constituting an act of bankruptcy, it is not requisite that bankruptcy should be certain; it is enough if it be imminently probable.

TINDAL, C. J.—The grounds of objection taken to the mode in which this case was summed up to the jury are two—first, that the attention of the jury was not sufficiently called to the fact that Flude & Simpson were in a state of insolvency at the time of the execution of the deed in question—secondly, that they were not told, that, to constitute the transaction a fraudulent preference in contemplation of bankruptcy, it was enough that bankruptcy was in a high degree probable: that is, that I did not sufficiently place before the jury the fact of the probability of the bankruptcy of Flude & Simpson at the time they executed the deed. The supposed act of bankruptcy by Flude was the execution of that deed in December, 1831. It is said, in the first place, that that assignment was a fraudulent grant made with a view to defeat or delay creditors; and, secondly, that it constituted a fraudulent and voluntary preference given by Flude

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to the joint creditors, with intent to defeat the claims of his separate creditors. The first description of act of bankruptcy is taken from the statute itself (s. 3), which enacts, "that, if any trader shall make or cause to be made any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, with intent to defeat or delay his creditors, such trader shall be deemed thereby to have committed an act of bankruptcy." To constitute the execution of a grant or conveyance an act of bankruptcy, within that clause, two circumstances must concur—the conveyance must be fraudulent, and it must be with intent to defeat or delay creditors. Looking at this instrument, it appears to me to be very unlike any grant or conveyance to which the attention of the courts has ever been called with reference to this question. So far from being a grant or conveyance made with intent to defeat or delay creditors, it is an agreement between two traders and their creditors, under which the former are to retain possession of the stock in trade for the purpose of enabling them to carry on the concern, and to be allowed a given time for the payment of a composition of 4s. 6d. in the pound on the debts of their joint creditors: and at the end of the deed is a clause whereby a policy of insurance upon the life of one of the partners is assigned to the trustees in trust to pay each creditor the balance of his demand, the surplus, if any, to go to the personal representatives of the life. The policy was at this time in the hands of Messrs. Hankey, the bankers of Flude & Simpson. What was the effect of this assignment at the time of its execution? The joint creditors, who were parties to it, could take no proceedings either against the person or the property of Flude until the expiration of the nine months given for payment of the last instalment; but the separate creditors of Flude were not prevented from suing immediately. The deed passed no property of which the creditors (whether joint or separate) could at the time avail themselves;

for, the policy of assurance would not be beneficial until after Flude's death; and therefore it cannot be held to be a grant whereby any class of creditors could be defeated or delayed (a). The fair import of the deed was to improve the condition of the separate creditors by de-

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livery of the joint creditors. Simpson, who witness, stated that his partner and himself when they got possession of their stock in the provisions of the deed, and were thus in pressure, they might go on and eventually ruin themselves. It was therefore purely a question and there could be little doubt that at the time the deed was executed the parties had no intent to defraud their creditors.—With respect to the other question whether this deed constituted a fraudulent pre-arrangement in contemplation of bankruptcy—it is to be observed that it did not issue until two years after the execution of the deed. The question was whether the fact of insolvency contemplated bankruptcy as a probable fact of insolvency is not enough to warrant that bankruptcy was contemplated; for, these events can arise except in cases of insolvency, bankruptcy does not necessarily terminate in bankruptcy. The evidence of Simpson as to this fact would weigh very much with the jury. Upon the whole I am satisfied with the verdict, and am not disposed to disturb it.

John Young Esq.
J. W. L. L.

—The main question was whether or not the deed was fraudulent and made with intent to defeat creditors. It was a question for the jury to decide upon the whole facts before them. Whether the deed was fraudulent or not was a question for the judge; but the question of intention must be submitted to the jury. It is

(a) See *Grogan v. Cook*, 2 B. & P. 230.

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objected that the fact of Flude & Simpson's insolvency was not placed with sufficient prominency before the jury. If it had been put to them in the way suggested, and the jury had found for the plaintiffs, doubtless we should have been entertained with a motion on the part of the defendants. Simpson stated that his partner and himself had hopes of continuing their trade; and the fact of the stock being left in their hands shews that this was the opinion of all the parties. The real question in cases of this sort is, whether bankruptcy is in the contemplation of the party. In all cases of insolvency, bankruptcy may be apprehended: but that is not enough to avoid the transfer or conveyance. It seems to me that there is no pretence for questioning the summing up in this case.

GASELEE, J.—I see no ground for disturbing this verdict. The questions were very properly left to the jury; and the Lord Chief Justice has expressed himself satisfied with the conclusion they have drawn from the facts.

BOSANQUET, J.—I am of the same opinion. The argument we have heard to-day proceeds upon the supposition that a grant or conveyance by one who is in insolvent circumstances of a part of his property, is necessarily fraudulent, because it tends to delay other creditors, notwithstanding bankruptcy does not ensue until two years afterwards. It appears here, that, so far from contemplating bankruptcy as either inevitable or even very probable, the parties were, with the assistance of their joint creditors, struggling to avoid it.

Rule refused (b).

(b) See *Morgan v. Brundett*, 5 B. & Ad. 296, 2 N. & M. 280; and *Gibson v. Boult*, post, Vol. 3, Easter Term, 6 Will. 4.
Atkinson v. Brindall, ante, 369;

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CANOT and Another, Assignees of HUGHES, an Insolvent Debtor, v. HUGHES, Administratrix.

Thursday,
Jan. 14th.

THIS was an action of trover brought by the plaintiffs as assignees of one Hughes, an insolvent debtor, deceased, to recover from the defendant certain wine warrants, the property of the deceased. At the trial before Tindal, C. J., at the Sittings at Guildhall after the last term, the plaintiffs, in order to prove the conversion, called a witness who stated that he demanded the warrants of the defendant, and that she informed him they were in the hands of S., her attorney. There was no proof of any demand on the attorney. His lordship, holding this to be no evidence of a conversion, nonsuited the plaintiffs.

Certain wine warrants coming to the possession of the defendant as the personal representative of her deceased husband, who died insolvent, she placed them in the hands of her attorney: the warrants being demanded on behalf of the assignees of the husband, the defendant referred the applicant to the attorney:—Held, that this was not sufficient evidence of a conversion.

Bampas, Serjeant, now moved that the nonsuit might be set aside, and a new trial had.—He submitted, that, the defendant having no right to exercise any act of ownership over them, the handing the warrants over to her attorney was a wrongful act, and a sufficient conversion to entitle the plaintiff to maintain the action; and that it was her duty to give them to her husband's assignees.

TINDAL, C. J.—There was no evidence of any notice to the defendant that the warrants in question were the property of the plaintiffs; and she appears to have affected no concealment as to the place of their deposit. The ground of the action of trover is a *wrongful* conversion: there must be some evidence to shew the defendant a tortfeasor (a). All that appeared here was, that, the warrants

(a) In *Hayward v. Seaward*, 1 M. & Scott, 459, the defendants having in their possession a boiler belonging to the plaintiffs, the latter demanded it, and the defendants at first refused to restore it, but afterwards, and before the issuing of the writ, tendered it: it was held that this was no conversion.

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coming to the hands of the widow in her representative character, she handed them over to her attorney for safe keeping; and, when asked for them, she gave the name of the attorney. There was clearly no conversion.

The rest of the court concurring—

Rule refused.

Friday,
Jan. 15th.

CORRE v. WHARTON.

Upon a reference to the prothonotary to inquire into the circumstances attending the settlement of an action, the prothonotary reported that the settlement was fraudulent as against the plaintiff, stating some of the facts that led him to that conclusion. On motion to confirm the report:—Held, that it was not competent to the counsel on the other side to impeach the facts found by the prothonotary, though they were at liberty to dispute his deductions therefrom.

Seemle that such a report should be in writing.

THIS was an action brought to recover a sum of 1500*l.* for arrears of an annuity. The action was commenced on the part of the plaintiff by one A. an attorney of respectability, and proceeded to judgment. B. was afterwards substituted for A. as the plaintiff's attorney. B., with the assistance of a pretended friend of the plaintiff, and without consulting the plaintiff, or communicating with his former attorney, A., entered into a compromise with the defendant, the result of which was that the judgment was set aside, B. receiving from the defendant 120*l.* and the friend 60*l.* Upon the application of the plaintiff, it was ultimately (with the consent of all parties) referred to one of the prothonotaries to inquire into the circumstances under which this compromise was effected, and to report to the court.

The prothonotary having *verbally* (a) reported that the compromise was fraudulent and made without the knowledge of the plaintiff, discharging the defendant from all knowledge of or participation in the fraud, and stating three several facts as having materially influenced his judgment—

Adams, Serjeant, moved that the prothonotary's report might be confirmed.

(a) The court seemed to think that in cases of this description the report ought to be in writing.

Spankie, Serjeant, *Falbot*, and *Arnold*, contra, were proceeding to argue upon the facts, when the court interposed, observing that, the question of fraud or no fraud having been referred to the prothonotary, it could not now be gone into.] *Spankie*.—If this were a motion for a new trial, it would be competent to the defendant to shew that the verdict was against the evidence. [*Park, J.*—This is rather like the case of an award: the facts found by the arbitrator cannot be disputed.] The prothonotary has found that the transaction was fraudulent, giving certain reasons for his opinion. Has not the defendant a right to go into the matter in order to shew that the prothonotary's deduction from the facts is fallacious? The finding of the arbitrator, with reasons, is in the nature of a special verdict. Suppose an arbitrator volunteers the statement upon his award of facts that were not in evidence before him? [*Tindal, C. J.*—You cannot dispute the prothonotary's conclusions of fact; but you may dispute his deductions therefrom. In the case of arbitration, the parties are at liberty to except to the reasons that are stated on the face of the award, not disputing the facts on which those reasons are founded.] They then proceeded in the course pointed out.

Adams, Serjeant, was stopped by the court.

TINDAL, C. J.—I have always imagined it to be generally understood in Westminster-Hall, that, when a question of fact is referred to an officer of the court, his report is conclusive, unless, upon a substantive motion, it is thought to be necessary to send the matter back to him. I agree, that, if the grounds stated upon the report are insufficient to support the conclusion, counsel are at liberty to that extent to reason upon it. Notwithstanding the observations I have heard, I see nothing to invalidate the conclusion at which the prothonotary has arrived. He

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assigns *certain* reasons for his opinion, not, as I understand, *all* the grounds upon which that opinion was founded: but still the reasons he has assigned appear to me to be amply sufficient. I therefore think that the report must be confirmed.

PARK, J.—I am of the same opinion: I think it would be establishing a very dangerous precedent if we permitted all the facts to be gone through again after the matter has by consent been referred either to an arbitrator or to an officer of the court. The ground of this attempt is that the reasons assigned by the prothonotary for the conclusion he has come to are not per se sufficient to justify it. To this I do not agree: but, assuming the reasons stated to be insufficient—it by no means follows that they constituted the only grounds of the decision. Had the parties desired it, the court would have directed an issue at first; and then, if the jury had found as the prothonotary has now found, their decision would have been held final.

GASELEE, J., and BOSANQUET, J., concurring, the prothonotary's report was confirmed, and the rule made absolute on terms.

Rule absolute.

Monday,
Jan. 18th.

A writ of right was sued out before the 31st December, 1834, and afterwards resealed and altered in the returns at various times, and ultimately made returnable on the 21st November, 1835; the last resealing being long subsequent to the latest period allowed by the 3 & 4 Will. 4, c. 27, ss. 36, 37, for bringing writs of right:—This court set aside the service of the writ of summons.

LEIGH, Demandant, LEIGH, Tenant.

THIS was a writ of right.

Wilde, Serjeant, obtained a rule nisi to set aside the writ of summons, on the ground that the original writ was first sealed on the 29th December, 1834, and the returns altered and the writ resealed on the 26th January, 1835,

the 15th April, the 30th May, and the 21st November; and that these alterations had been made by the curitor without any new præcipe or any authority whatever. The writ of summons was served in November last.

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Humfrey shewed cause.—He produced an affidavit explaining the causes of the delay in proceeding on the writ, and shewing that it had always been the practice in the curitor's office to alter the returns of writs of right and re-seal them without any new præcipe. [*Tindal*, C. J.—The question is whether the demandant has commenced his action within the time limited by the statute 3 & 4 Will. 4, c. 27.] The demandant has brought his action (by suing out the writ) in time, and he has (in altering the return and re-sealing the writ) complied with the practice of the court out of which the writ issues.

Wilde, Serjeant, and *W. H. Watson*, contra, were stepped by the court.

TINDAL, C. J.—The question turns entirely upon the construction of the statute 3 & 4 Will. 4, c. 27, which prohibits the issuing of writs of right after the 31st December, 1834, except under certain circumstances, when the time is extended to the 1st June, 1835. Was the present suit commenced before the 31st December, 1834? The writ appears to have been originally sealed on the 29th December, 1834; but the returns have been altered from time to time. The writ was kept from the 29th December to the 26th January a perfectly inoperative instrument. Various alterations in the returns afterwards took place—the last being in Michaelmas Term, 1835. Now, what is the effect of these alterations? In substance and effect the re-sealing appears to me to be the commencement of the action. When it was altered and re-sealed on the 21st November, it became a new writ. If

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we were to hold the proceedings under a writ so circumstanced to be regular, it seems to me that we should be repealing the statute, and authorising the commencement of real actions at a time subsequent to that contemplated by the legislature.

PARK, J., and GARRETT, J., concurred.

BOSANQUET, J.—The object of the legislature was to put an end to writs of right from and after a given day. The 36th section of the act referred to enacts “that no writ of right patent, &c., &c., and no other action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment), and no plaint in the nature of any such writ or action (except a plaint for free bench or dower), shall be brought after the 31st December, 1834.” And the 37th section, under certain circumstances, extends the period to the 1st June, 1835. Here, it appears that the writ was originally sued out before the 31st December, 1834; and that the demandant afterwards caused it to be re-sealed and the returns altered at various times, the last alteration taking place after the extended period mentioned in section 37. It appears to me, that, if we held a writ so altered to be available, we should be authorising the bringing of a real action at a time subsequent to that which the legislature contemplated and has plainly expressed.

Rule absolute (a).

Monday,
Feb. 1st.

The court refused to reopen the rule upon an affidavit that the demand-

ant's attorney had been informed by the cursitor that it had been the invariable and immemorial practice in his office to re-seal writs when presented for that purpose within four terms of the rule.

Kelly, on a subsequent day, moved for a suspension of the above rule, upon an affidavit stating that since the

(a) See *Miller, Dem.*, *Miller, Ten.*, ante, p. 116; *Foot, Dem.*, *Shirreff, Ten.*, post.

rule was pronounced application had been made to the curitor who informed the party that the invariable and immemorial practice of his office was to re-seal all original writs when presented for that purpose at any time within four terms from the teste.

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TINDAL, C. J.—Whatever the practice in this respect in the curitor's office before the passing of the 3 & 4 Will. 4, c. 27, it cannot render legal the re-sealing, which is tantamount to the issuing of a new writ, after the period from which the legislature has declared that no writ of right thenceforth shall issue. *Oggyer v. Heywood*, Ambler, 59, I had in my mind when this case was before the court the other day, but I did not cite it, not being able at the moment to find it. It appears to me to be very nearly in point. Lord Chancellor Hardwicke there said: "This is a motion to quash or supersede an original sued out of this court, and returnable in the court of Common Pleas. As to the first part of the motion, to quash the writ, it appears the writ is actually returned in the Common Pleas, so that this court has no power over it from that time: and, if it had, yet, as nothing appears erroneous on the face of it, this court could not quash it, for, what is cause to quash, must be apparent on the face of the writ itself. As to the other part of the motion, I am of opinion it ought to be superseded; the cause generally assigned for superseding writs of this sort is quia improvidè emanavit. The case is this: The original writ was sued out in a popular action, tested the 22nd November, 1745, and delivered to the sheriff to be executed, who served a copy of the writ upon the defendant, with notice underwritten to appear by attorney &c., from a mistaken notion that it is within the late act of parliament, which says that where the cause of action in a superior court does not amount to 10*l.* a copy of the process shall be served on the defendant. The plaintiff

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finding out the mistake, that the service was not regular, and no summons had been given, went to the cursitor, and got the writ altered, by erasing the words of the return, which were Octav. Hilar., and making it returnable Octav. Purificationis, and got it re-sealed, by which the action appeared to have been brought within six months, but in fact was not. It was said, on the part of the plaintiff, that this has been the practice of the cursitor's office for many years, and an affidavit by Mr. Burton, one of the cursitors, was read in court to that purpose; and it was also said that the officers of the stamp duty do not expect a new stamp on such occasion. But I cannot now go into this matter, because it is not an application by the officers, nor a motion to the court to censure the attorney or cursitor, and therefore it would be proper for the officers of the stamp duty to apply to the court if they have any doubt upon the matter." And the writ was accordingly superseded. Applications of this sort are not to be favoured.

The rest of the court concurring—

Kelly took nothing.

Monday,
Jan. 18th.

GOLDNEY and Another v. LAPORTE.

An irregularity in the proceedings upon the ca. sa. against a principal, may be taken advantage of by the bail on motion, and need not be pleaded to the sci. fa.

WILDE, Serjeant, on a former day, obtained a rule calling upon the plaintiffs to shew cause why the writ of scire facias against the bail in this cause, and all proceedings thereon, should not be set aside for irregularity, with costs. The irregularities complained of were—that the venue was laid in London, and no ca. sa. against the defendant had been lodged in London (a)—and that the ca. sa. improperly lodged at the office of the sheriff of Middle-

(a) See the cases collected in Arch. Pr., 3rd edit. by Chitty, 523.

sex, was tested the 30th June, 5 Will. 4 (1834), and made returnable on the 16th November following; while the judgment was not signed until the 30th October, 1834 (b).

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Talfourd, Serjeant, shewed cause.—He cited *Philpot v. Manuel*, 5 D. & R. 615, where it was held that the want of a ca. sa. is not an irregularity, but matter of substance, of which the bail can only take advantage by plea; and *Dudlow v. Watchorn*, 16 East, 39, where it was held that the practice of the court is pleadable where the very merits of the case depend upon it; and therefore, that, where bail sued in scire facias upon their recognizance pleaded that no ca. sa. was duly sued, returned, and filed against the principal, according to the custom and practice of the court; to which the plaintiff in reply shewed a writ of ca. sa. issued into Middlesex—it was no departure for the defendants to rejoin that the venue in the action against the principal was in London, for that sustains the plea. And he submitted, that, although the irregularities here complained of, being matter of substance, might be taken advantage of by plea, they could not be made the subject of a motion.

Wilde, Serjeant, in support of his rule, was stopped by the court.

PER CURIAM.—No authority has been or can be cited to shew that the irregularities here complained of cannot be taken advantage of on motion: all that the cases cited shew, is, that the matter may also be pleaded. It seems to us that the more convenient and proper course is to proceed by motion.

Rule absolute (c).

(b) See *Peacock v. Day*, 3 Dowl. 291.

(c) Bail cannot take advantage

of a mere irregularity in the scire facias by pleading—*Powell v. Taylor*, Tidd's Pr. 9th edit 1129.

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Monday,
Jan. 18th.

In an action of slander, the existence of express malice is only a matter for inquiry where the words complained of are spoken upon a justifiable occasion.

The plaintiff had lived in the employ of the defendant and his partner, linendrapers at Devonport, and had left them with a written character in which he was described by the defendant as "steady, honest, and industrious." Shortly afterwards some goods that had been stolen from the defendant's shop were found in the possession of a female servant (a person of notoriously bad character), which she stated to have been given to her by the plaintiff.

The defendant

thereupon went to the house of the plaintiff's uncle in the neighbourhood of Devonport, and there saw the plaintiff's cousin, and in the course of conversation with her said of the plaintiff—"He has stolen my goods: he has taken our goods, and given them away: we always suspected him of dishonesty." These words were afterwards repeated in the presence of the uncle. A letter was despatched by the defendant to the plaintiff in London, desiring him to go down to Devonport to meet the charge: but in the meantime the plaintiff's brother had been prevailed upon to settle the affair by giving the defendant 50*l.*; and, when the plaintiff arrived in Devonport, the defendant declined to press the charge:—Held, that the communication to the plaintiff's cousin at all events was unjustifiable; and, that the whole course of the defendant's conduct was so irreconcilable with an intention *bonâ fide* to institute a legal investigation, as to dispense with the necessity for the plaintiff's proving express malice; and consequently that the question of malice ought not to have been left to the jury.

HOOPER v. TRUSCOTT.

SLANDER.—The declaration charged the defendant with having spoken of the plaintiff the following words: "He has committed felony: he has stolen my goods: he has taken our goods, and given them away: we always suspected him of dishonesty." The defendant pleaded not guilty, and also a justification, which ultimately was abandoned.

At the trial before Patteson, J., at the last Spring Assizes for the county of Devon, the following facts appeared in evidence:—In the year 1834, the plaintiff was in the service of Messrs. Cree & Truscott (the defendant), who carried on the business of drapers at Devonport. On the 5th November in that year, he voluntarily quitted Devonport, and came to London, receiving from his employers the following written character: "The bearer, Mr. Rowland Hooper, has lived with us as an assistant in the general linen and woollen-drapery business for about the last six months, during which time we found him to be a steady, *honest*, and industrious young man." In addition to this, the defendant gave him a memorandum containing the names of seven wholesale dealers in London with whom Messrs. Cree & Truscott were in correspondence; at the bottom of which memorandum he wrote the following: "If any of the above can do anything for the bearer, James Truscott will feel obliged."

A short time after the departure of the plaintiff, a pair

of silk stockings, and a small quantity of satin, silk, muslin, &c., which had been stolen from the shop of Cree & Truscott, were found in the possession of one Rebecca Price, a servant who had been living a short time with the defendant's family. Upon discovering the theft, the girl was questioned, and she stated that the articles found were given to her in the shop by the plaintiff. It was admitted on all hands that the girl was a very worthless person, that she had been dismissed from several places for dishonesty, had been hired by the defendant with a false character, and had lived for some time in a state of publicity at Stonehouse. Nevertheless, upon the mere information of this individual, given with great prevarication, the defendant, on the 2nd December, went to the house of a Mr. Spry, the plaintiff's uncle, to inquire where the plaintiff was to be found; and there saw Miss Spry, to whom he related what had been said by the girl Rebecca, charging the plaintiff with the felony, and adding: "We suspected him (meaning the plaintiff) for a long time: if we had not suspected him in other things, I should not believe the girl, as she is a very bad woman, and has been on the town, and got into my service by a false character written by her sister." Mr. Spry, the uncle, then coming in, the defendant repeated the story to him.

On the 3rd December, the following letter (written by the defendant, and signed Cree & Truscott) was addressed to the plaintiff:—

"Mr. Hooper.—We are sorry to inform you a charge has been preferred against you by one of Mr. Truscott's servants, in whose possession a quantity of our goods was found—that they were given to her by you one morning in the shop before it was opened for business. She having brought such a charge, it is highly necessary that you should immediately come down, in order to contradict the statement, or otherwise we shall consider you open to prosecution, which will be carried into effect forthwith. Your

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mele Spry has been made acquainted with the circumstances, and approves the step we have taken."

Immediately on the receipt of this letter the plaintiff proceeded to Devonport, where (he having been accidentally delayed at Portsmouth) he arrived in the afternoon of the 9th December. He went directly to Mr. Spry's, and thence (accompanied by his brother and Miss Spry) proceeded to Cree & Truscott's, when the defendant repeated the charge, and went out avowedly for the purpose of procuring a constable. The constables came soon after, but under the circumstances declined to take charge of the plaintiff without a warrant. The defendant and the constable then applied to the justices' clerk for a warrant, which the latter said was unnecessary, and therefore refused to grant it, but said that the parties might go before the magistrates the next day. The plaintiff's brother had previously to the plaintiff's arrival been induced to place in the hands of Cree & Truscott a sum of 50*l.*, upon an agreement that the money was to be restored to him if the plaintiff came forward to meet the charge. Cree & Truscott took no further steps to investigate the charge; but retained the 50*l.*

On the 12th December, the plaintiff's attorney addressed a letter to Messrs. Cree & Truscott, as follows:—

"You are aware that Mr. Rowland Hooper has journeyed from London to this place to meet a charge of felony which you had alleged against him. He has been informed by his brother that you have this day stated you do not intend to proceed in the matter. You must be fully aware how perfectly impossible it is for Mr. R. Hooper to quietly permit such an accusation to pass unnoticed; therefore I hope you will see the necessity of causing an immediate investigation before the magistrates. You are the only persons with whom such a measure can originate: if Mr. Hooper could effect it, he would immediately take the necessary steps. If you do not take the course I have pointed out, it is to be inferred you have no just ground

for the accusation, and that you will readily do perfect justice to Mr. Hooper's character, pay the expenses of his journey, and for his loss of time. This is all he seeks at your hands. But, if you refuse to have the matter investigated, and also refuse to remove the stigma placed upon him, he has no alternative than to establish his innocence by proceeding against you; which he has determined to do immediately. I shall be glad of an early reply, as Mr. Hooper's family are very anxious to see him, but he cannot with comfort to himself visit them till this serious affair be settled in some way."

This letter produced no reply: nor was any further notice taken by Cree & Truscott of the plaintiff or of the charge they had preferred against him.

Upon this state of facts, it was contended on the part of the defendant, that, inasmuch as there was no evidence to shew that he acted other than in the bona fide belief that the charge against the plaintiff was true, and as the words were spoken on a privileged occasion, the plaintiff must be nonsuited: and *Blake v. Pilfold*, 1 M. & Rob. 198, was cited. The learned judge declined to nonsuit the plaintiff, observing that the question of bona fides must go to the jury: and, in leaving the case to them, he said the question might be considered with reference only to the words spoken to Miss Spry, for that the communication to John Hooper was of his own seeking; that, if they thought that the communication to Mr. and Miss Spry was made bona fide for the purpose of investigating the charge, the defendant believing it to be true, and for the purpose of giving the plaintiff an opportunity of meeting it, then they must find for the defendant; but that, if they thought the defendant was actuated by malice, not believing the charge to be true, they must find for the plaintiff. A verdict was found for the defendant, on not guilty.

Bompas, Serjeant, in Easter Term last, moved for a

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new trial, on the ground of misdirection.—In *Bromage v. Prosser*, 4 B. & C. 247, 6 D. & R. 296, 1 C. & P. 475, where, in an action for slandering the plaintiffs in their business of bankers, it was proved that one W. said to the defendant, “I hear that you say that the plaintiffs’ bank at M. stopped; is it true?” and the defendant answered, “Yes, it is; I was told so; it was reported at C., and nobody would take their bills; and I came to town in consequence of it myself.” upon a motion for a new trial, it was held, that, although malice is the gist of the action for slander, there are two sorts of malice—malice in fact, and malice in law—the former denoting an act done from ill will towards an individual, the latter a wrongful action intentionally done, without just cause or excuse; that, in ordinary actions for slander, malice in law is to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but, in cases for slander *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved. The question here is, whether the communication was privileged or not; for, if not, the law will imply malice: on the other hand, if the occasion of the speaking were justifiable, the plaintiff would be bound to prove express malice. The communication to the plaintiff’s cousin, beyond all doubt, was perfectly unjustifiable: nor had the defendant any right to repeat the charge to the uncle, Spry; the only course the law would justify, if he *bonâ fide* believed the accusation and intended to notice it, would be the putting the matter in a course of legal investigation. The object of the defendant, however, was not to put the matter in a course of legal investigation: his object (as the event proved) was, to intimidate the friends of the plaintiff, and thereby extort money from them for compromising the charge. The attention of the jury was confined to the words spoken to Miss Spry; and they were told, that, if

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they thought the words were spoken bona fide to the friends of the plaintiff, the defendant believing them to be true; the occasion was justifiable. In *Smith v. Matthews*, 1 M. & Rob. 151, it was held, that, where a person originates false reports prejudicial to a tradesman, and, being called on by the employers of the tradesman to examine the matters complained of, repeats to them the false statement, such statements are not privileged communications.

A rule nisi having been granted—

Crowder and Butt shewed cause.—The jury by their finding, which is well warranted by the evidence, have negatived the existence of malice in fact; the sole question therefore is, whether the occasion justified the speaking of the words, so as to negative malice in law. The law upon this subject is very correctly laid down by Taunton, J., in *Blake v. Pilfold*; where it was ruled that a letter written by a private individual to a public officer, complaining of the misconduct of a person under him; if written bona fide and without malice, was not actionable, though some of the charges might not be true: and the learned judge said, in leaving the case to the jury: "There are certain cases in which communications are what the law terms privileged, and when the occasion on which the communication is made rebuts the inference of malice. I allude to the occasions where a man, on being applied to, gives a character of a servant, or where he gives confidential advice, or where the occasion of the communication is such as *prima facie* affords an excuse for making it. In all these cases, a plaintiff must give evidence of express malice." Here, there was nothing whatever to justify an inference that the defendant was actuated by malice. He had reasonable ground for his suspicion of the plaintiff, which was not aroused until after he had given him the written character upon which so much reliance was placed at the trial to shew malice.

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The communication to the relatives of the plaintiff was clearly made with the bonâ fide view of investigating the charge: and the question of bona fides was left to the jury. Under the circumstances, the defendant had a right to communicate with the uncle. [*Tindal*, C. J.—Perhaps he had: but he first made the communication to Miss Spry; was that privileged?] The communication being privileged as to the uncle, the presence of the cousin cannot in any degree alter its character. In *Child v. Affleck*, 9 B. & C. 403, 4 M. & R. 338, the libel consisted of a voluntary communication as to alleged acts of misconduct by the plaintiff after leaving the defendant's service; and yet Lord Tenterden held that the communication was privileged, and directed a nonsuit, which was afterwards upheld. In *Toogood v. Spyring*, 1 C. M. & R. 181, 4 Tyr. 582, A., the tenant of a farm, required some repairs to be done to the farm-house; and B., the agent of the landlord, directed C. to do the work. C. did it, but in a negligent manner, and during the progress of it got drunk, and some circumstances occurred which induced A. to believe that C. had broken open his cellar-door and obtained access to his cyder. A. two days afterwards met C. in the presence of D., and charged him with having broken open his cellar-door, and with having got drunk and spoiled the work. A. afterwards told D., *in the absence of C.*, that he was confident C. had broken open the door. On the same day, A. complained to B. that C. had been negligent in his work, that he had got drunk, and that he thought he had broken open his cellar. In an action of slander, it was held that the complaint to B. was a privileged communication, if made bonâ fide and without any malicious intention to injure C.; that the statement made to C. in the presence of D. was also privileged, if done honestly and bonâ fide; that the circumstance of its having been made in the presence of a third person did not of itself make it unauthorised; and that it was a question to be left to the jury to determine from the circumstances, in-

cluding the style and character of the language used, whether A. acted bonâ fide, or was influenced by malicious motives (a). Parke, B., in delivering the judgment of the court in that case says: "In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his own interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from authorised communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society (b); and the law has not restricted the right to make them within any narrow limits. I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry alone and not in the presence of a third person. If made with honesty of purpose to a party who has an interest in the inquiry (and that has been liberally construed—see *Child v. Affleck*), the simple fact that there has been some casual by-stander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion on which they are made, they were not protected unless strictly private. In this class of com-

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(a) It was also held that the statement to D. in the absence of C., was unauthorized and officious, and therefore not protected, although made in the belief of its

truth, if it were in point of fact false.

(b) See *Smith v. Thomas*, Ante, p. 546.

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communications is no doubt comprehended the right of a master bona fide to charge his servant, for any supposed misconduct in his service, and to give him admonition and blame: and we think that the simple circumstance of the master exercising that right in the presence of another does by no means of necessity take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement when made with honesty of purpose: but the mere fact of a third person being present, does not render the communication absolutely unauthorized, though it be a circumstance to be left, with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted bona fide in making the charge, or been influenced by malicious motives. *Bromage v. Prosser* is a case of a totally distinct character from the present: Bayley, J., there says: "In actions for such slander as is prima facie excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it or have a right to expect it, malice in fact must be proved by the plaintiff: and in *Edmondson v. Stevenson*, Bull. N. P. 8, Lord Mansfield takes the distinction between these and ordinary actions of slander." In *Flower v. Homer*, 3 Camp. 293, it was held that an action of defamation could not be maintained against a man whose property had been stolen, and who, upon reasonable grounds of suspicion, charged an innocent person with having stolen it. And in *Finden v. Westlake*, 1 M. & M. 461, in an action for a libel in publishing a handbill offering a reward for the recovery of certain bills of exchange, and stating that A. B. was suspected of hav-

ing embarrassed them, it was held to be a good defence, on the general issue, that the handbill was published solely with a view to the protection of persons liable on the bills, or to the conviction of the offender. All the cases lay it down, that, if the occasion be justifiable, and the communication bona fide (which is a question for the jury), the presence of a third person to whom if alone the communication could not legally be made, does not destroy its privileged character.

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Bompas, Serjeant, and Meolly, in support of the rule. In *Bramage v. Prosser*, Bayley, J., delivering the judgment of the court, says: "In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. This is so laid down in *Styler*, 392, and was adjudged upon error in *Mercer v. Sparks*, Owen, 54, Noy, 35. The objection there was that the words were not charged to have been spoken maliciously; but the court answered that the words were themselves malicious and slanderous, and therefore the judgment was affirmed. Though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice." The words being in themselves slanderous, the law infers malice, unless it be shewn that the occasion was a justifiable one, and the communication made bona fide. — *Res. v. Harvey*, 2 B. & C. 257, 3 D. & R. 464; *Res. v. Cregey*, 1 M. & S. 278; *Harwood v. Green*, 3 C. & P. 141: the party making the communication must shew some legal or moral ground for making it to the individual to whom it is made. In *Blade v. Rickfold*, the communication was justifiable, in the absence of malice. So, in *Flower v. Hamer* and in *Child v. Affleck* in the former, the defendant was bona fide proceeding in a legal course of inquiry; and, in the latter, the words

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were spoken upon an occasion to which from the necessity of the thing the law allows a greater degree of latitude than is allowed in any other case, viz. in giving a character of a servant. In *Toogood v. Spyring*, the speaking the words *to the party charged* in the presence of a stranger, was held justifiable, if done without malice: but it was held that the repetition of the words to the stranger *in the absence of the party charged*, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were in point of fact false. In *Corbet v. Hill*, Cro. Eliz. 609, in an action for these words: "The plaintiff was perjured in his answer in the Star Chamber"—innuendo, a bill there exhibited by the plaintiff against the defendant: after verdict, it was moved that the action lay not; for, it is well known that a plaintiff cannot be perjured in his bill exhibited, for he is never sworn thereto: but all the court held that the action was maintainable for the first words, and they be sufficient without the innuendo, which, being repugnant, is void, and not to be regarded. [*Tindal, C. J.*—It does not appear from the report of that case that the libel was not malicious: the mere dry conclusion is given. In the present case, I presume it is admitted that the communication to the uncle, if made bona fide for the purpose of investigation, would be privileged.] The communication would be privileged if made in the bona fide prosecution of a course of *legal* investigation, and to the party himself, though in the presence of others, or to some person having authority over him. But there is no rule of law to sanction a difference in this respect between a relative and a stranger. The first communication to Miss Spry, in the absence of the uncle, was clearly not justifiable or privileged, even if the repetition of it in the uncle's presence were so. Again, the conversation with the plaintiff's brother, not having in view the proper legal investigation of the charge, but an illegal compromise of it, could not

be justified. [*Tindal*, C. J.—The communication to the brother ought, I think, under the circumstances, to be omitted from the argument.] If any one of the conversations was unjustifiable, it is enough to entitle the plaintiff to a new trial. The circumstances were pregnant with malice in fact. The obtaining a sum of money from the plaintiff's brother, raises a strong presumption that the defendant was satisfied of the falsity of the accusation. [The court here interposed.]

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TINDAL, C. J.—I see no ground for disputing the general rule of law as laid down by the learned judge at the trial. But, under the particular circumstances of this case, I think the rule hardly applies. The existence of express malice, or malice in fact, is only a matter for inquiry where the libel complained of is written, or the words are spoken, upon an occasion which the law holds justifiable. No case has been cited to shew that a communication to a relative of the party charged is held to be privileged unless upon this ground. Looking at the evidence here, I am at a loss to perceive the object of the conversation with Miss Spry: it could not be for the purpose of investigating the matter. With respect to the subsequent communication, though perhaps not strictly privileged, yet the circumstances under which it was made might be admissible in evidence to shew the animus by which the defendant was influenced. Upon the whole, however, as these communications do not seem to be quite reconcileable with a fair and bona fide intention to institute a just prosecution of the plaintiff, I think the matter should undergo another investigation.

The rest of the court concurring—

Rule absolute (c).

(c) See *Moore v. Terrell*, 4 B. & M. 467, 1 Ad. & E. 43; *Brooks v. Blanchard*, 1 C. & M. 779, 3 Tyr. 844.
 & Ad. 871, 1 N. & M. 559; *Kelly v. Partington*, 2 N. & M. 460, 4 B. & Ad. 700; *Knight v. Gibbs*, 3 N.

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Monday,
Jan. 18th.

The defendants were the proprietors of a scribbling and fulling mill, and were employed by H. & Co. (amongst others) to scribble and full wools and cloths, under a stipulation that "all goods on hand" should be subject to a lien for a general balance. H. & Co. dyed their wools on defendants' premises, and kept there a quantity of oil and dye-woods—the oil being there for the purpose of being used as required by the defendants' servants in the process of scribbling, but kept locked up, and delivered out in small quantities by a servant of H. & Co.—and the dye woods to be used by H. & Co. in dyeing the wools in an intermediate stage of the process of scribbling:—Held, that the oil and dye-woods were not subject to the lien.

CUMFSTON and Others, Assignees of DANIEL and JOSEPH HAIGH, Bankrupts, v. WILLIAM and JOHN HAIGH.

TROVER for oil, madder, camwood, logwood, fustic, a dye-pan, casks, &c., the goods and chattels of Daniel and Joseph Haigh before their bankruptcy.

The defendants pleaded, that, long before the said Daniel Haigh and Joseph Haigh became bankrupts, and the said supposed conversion in the declaration mentioned, the defendants were lawfully possessed of a certain scribbling and fulling mill and premises at Slaihwaite, wherein the defendants carried on their business of scribbling and fulling wool, for certain reward to them the defendants in that behalf, and on certain terms, that is to say, that *all goods on hand were subject to a lien for a general balance*; that, whilst they carried on their business on the said terms, the said Daniel Haigh and Joseph Haigh, during a long space of time before they became bankrupts, brought divers quantities of wool to the said mill and premises of the defendants *to be by them scribbled and fulled in their said business*, for the said reward to them in that behalf, and on the terms aforesaid, during all which time the said Daniel and Joseph Haigh had notice of the terms aforesaid on which the defendants carried on their business, and in respect of which said work of *scribbling and fulling wool* as aforesaid they the said Daniel and Joseph Haigh, before and at the time they became bankrupts, and thence until and before and at the time of the said supposed conversion, were and still are largely indebted to the defendants *for the said scribbling and fulling wool* for them the said Daniel and Joseph Haigh, in a certain large general balance, to wit, in the sum of 366*l.* 14*s.* 5*d.*, and the said goods and chattels in the declaration mentioned *were delivered at the defendants' mill and premises in the course of their said business; and be-*

fore the said Daniel and Joseph Haigh became bankrupts, and before and at the time of the said supposed conversion were and still are goods of the said Daniel and Joseph Haigh in the said mill and premises *on hand* and subject to the said lien of the defendants for the said balance: of all which premises the said Daniel and Joseph Haigh before they became bankrupts, and the plaintiffs as assignees as aforesaid since, during all the times aforesaid, respectively had notice: and the defendants said, that, by reason of the premises aforesaid, the defendants, at the said time in the declaration mentioned, detained the said goods and chattels, and still detain and hold them, for their lien aforesaid, as they lawfully might for the cause aforesaid; which detaining and holding of the said goods and chattels is the said supposed conversion thereof in the declaration mentioned—verification.

The plaintiffs replied, that the said goods and chattels in the declaration mentioned were not nor was any part thereof delivered before the said Daniel and Joseph Haigh became bankrupts at the defendants' said mill and premises *in the course of the said business in the said plea mentioned, and were not*, nor was any part thereof, before or at the time of the conversion thereof in the declaration mentioned, *goods of the said Daniel Haigh and Joseph Haigh in the said mill and premises of the defendants on hand subject to the said supposed lien of the defendants for their said general balance in the plea mentioned, modo ac forma—concluding to the country.* Issue thereon.

The cause was tried before Tindal, C. J., at the last Assizes at York. The evidence was as follows:—The defendants (one of whom was the father, and the other the uncle of the bankrupts) were possessed of a scribbling and fulling mill at Slaithwaite near Huddersfield, in which they scribbled and fulled wool and cloth for various manufacturers, but principally for the bankrupts who had the exclusive use of a dye-house attached to the defendants'

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mill, and also the use of a room in the mill called the fulling room. The bankrupts' business with the defendants was carried on in the following manner: They purchased wool, which when ready for scribbling (which comprises teasing, carding, and slubbing) was delivered for that purpose to the defendants. When the wool had gone through the process of scribbling and been made ready for spinning and weaving, it was put into the hands of persons called piece-makers, who both spun the yarn and wove it into cloth. When woven the cloth was delivered at the defendants' mill to the servants of the bankrupts there, and handed over to the defendants for the purpose of being scoured. It was afterwards burled (that is, freed from imperfections on its surface) by people employed by the bankrupts, and then brushed by a brushing machine belonging to the defendants, and delivered to the defendants for the purpose of being milled or fulled, when it was in a fit state for market. The oil in question was kept in a cask on the defendants' premises, to be used in the process of scribbling, the key being kept by a servant of the bankrupts, and small quantities of the oil given out by him from time to time as required. The madder and dye-ware were also kept upon the premises, but were only used by the bankrupts, who themselves superintended the process of dyeing the wool. A notice was put up in the mill, of which the bankrupts were cognisant, as follows:—"All goods on hand subject to a lien for a general balance." Under this notice the defendants claimed a right of lien upon the oil, madder, dye-ware, and dye-pan belonging to the bankrupts and remaining upon the defendants' premises after the bankruptcy, for the general balance (between 300*l.* and 400*l.*) due to them from the bankrupts for scribbling wools and scouring and milling cloths for them.

A verdict was found for the plaintiffs, damages 120*l.*, with leave to the defendants to move to set it aside and

enter a nonsuit, or to reduce the damages to 60*l.*, the value of the oil.

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&
HAIGH.

Alexander, accordingly, in the last term, obtained a rule nisi.

Tomlinson shewed cause.—In *Houghton v. Matthews*, 3 B. & P. 494, Heath, J., says: “There are two species of liens known to the law, viz. particular liens, and general liens. Particular liens are where persons claim a right to retain goods in respect of labour or money expended upon them; and these liens are favoured in law. General liens are claimed in respect of a general balance of account; and these are founded in custom only, and are therefore to be taken strictly.” And in *Rushforth v. Hadfield*, 6 East, 522 (a), Lord Ellenborough gives a similar definition. He says: “A common carrier is bound by the custom of the realm to carry goods for a reasonable reward to be paid for the same goods, and the law gives him a lien on the particular goods for the price of the carriage of them; and by special contract with the customer he may extend that right to a lien for his general balance. But if it be insisted on that there is a general custom of trade applicable to all carriers to have a lien for their general balance, it should be shewn in a very different manner in evidence.” According to the evidence in the cause, it is perfectly clear that the general lien claimed by the defendants in this case cannot be held to embrace the articles in question. With respect to the madder and dye-wares, they were not on the premises for the purpose of being used by the defendants in any part of the process of manufacture in which they were concerned: and, as to the oil, which alone was to be used by them in the operation of scribbling, that cannot be said to have ever been in the defendants’ possession; it

(a) S. C. 2 Smith, 264; 7 East, 224, 3 Smith, 221.

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was kept locked up, the key being in the custody of one of the bankrupts' servants, who measured out and delivered to the defendants' men small quantities as they required it; the defendants had no control over it whatever. The defendants' lien can only apply to wools or cloth. A particular lien would only entitle them to detain each parcel of wool or cloth for the price of their labour bestowed in respect of such parcel: and the extension of a particular to a general lien is nothing more than this, viz. giving the party a right to hold all goods of the like nature for the general balance due in respect of work done upon any of them. The lien here claimed therefore falls within neither of the descriptions of lien mentioned by Mr. Justice Heath. [*Tindal*, C. J.—The question is whether these are "goods on hand" within the meaning of the notice exposed in the mill.] Construing the notice by the claim of lien set up by the defendants in their plea, it is impossible to give it any other application than to goods deposited with the defendants *in the course of their business*, viz. for the purpose of being scribbled or fulled: and this never can be held to cover the oil deposited in the mill under the control of the bankrupts for the purpose of being used in the manufacture of future goods; still less can it apply to the dye-wares, which were not the subject of any labour whatever by the defendants.

Alexander and Hoggins, in support of the rule.—The whole questions turns upon the meaning of "goods on hand" in the notice. On the part of the defendants it is submitted that these words embrace every article accessory to the manufacture of the cloth that is brought within the control of the owners of the mill. Best, C. J., in *Jacobs v. Latour*, 2 M. & P. 201, 5 Bing. 132, says that, "as between debtor and creditor, the doctrine of lien is so equitable, that it cannot be favoured too much." The lien extends at all events to the oil which was to be used by

the defendants, if not to the dye-wares; to that extent therefore the rule must be made absolute.

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TINDAL, C. J.—I am of opinion that this rule ought to be discharged. This is an action of trover for oil and dye-wares, &c., and the question is whether the defendants have shewn themselves entitled to retain the goods in satisfaction of a lien for a general balance. The right to lien in all cases depends either upon the particular stipulation between the parties, or upon some general custom of the trade. In the present case there was no evidence of general usage as to these articles, and therefore the inquiry is confined to whether or not there was any express stipulation between the parties: and this turns entirely upon the notice that was exposed in the defendants' mill—"All goods on hand are to be subject to a lien for a general balance." The defendants contend that this notice not only covers goods in the course of manufacture in their business of scribbling and fulling, but also covers the adscititious articles used in the course and progress of the work. Goods on hand, taken separately and in the general sense of the words, as applicable to this case, mean goods in the progress of scribbling or fulling: and to that extent no doubt the defendants were entitled to a general lien under the notice. But, in order to give them a lien to the extent claimed, we must hold the notice to override all the articles belonging to the owners of the goods brought to the mill to be incidentally applied in the course of the manufacturing process. To bring these within the operation of the notice, I think the defendants ought to have expressed themselves more distinctly and definitely, and should have stated in it that they claimed a lien as well on the articles left on the premises to be used in the manufacture as on the goods themselves that were in the course of manufacture. Taking it, therefore, on the words used by the defendants themselves, I hold the articles which form the subject of this action not to come

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within the stipulation in virtue of which the lien in question is claimed. An additional reason for so holding arises from the evidence given in the course of the cause, that the bankrupts were the only customers of the defendants who kept any stock of oil and dye-wares upon the defendants' premises. The notice, therefore, quoad articles of that description, could not have been addressed to the public: it could only have been intended to apply to goods the subject of the labour of the defendants' mill.

PARK, J.—This is not a case of a general lien claimed under an usage of trade; but a lien depending upon the particular stipulation between the parties: and the question is whether the lien claimed is within the contract. The greater portion of these goods were never in fact in the hands of the defendants at all: according to the evidence, the oil (which was the only article amongst those sought to be recovered in this action that was used in the course of the work to be done by the defendants) was delivered out by a servant of the bankrupts in small quantities as it was wanted; and the dye-wares were used by the bankrupts themselves, and not by the defendants. For the reasons given by the Lord Chief Justice, I concur with him in thinking that the defendants' lien did not and was not intended to extend to the goods in question.

GASELLE, J., concurred.

BESANQUET, J.—I am also of opinion that the goods that are the subject of this action were not goods on hand within the meaning of the notice.

Rule discharged.

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SIMPSON v. Sir W. CLAYTON, Bart., Administrator of Sir
W. CLAYTON, Bart., deceased,

*Tuesday,
Jan. 19th.*

THE declaration stated, that, before the making of the indenture of lease thereafter set forth, W. Clayton was lawfully possessed of the tenements and premises therein-after mentioned to have been demised, for the residue and remainder of a certain term of years, to wit, the residue of the term of ninety-nine years commencing from the 5th March, 1777, theretofore granted of the said premises (inter alia) under and by virtue of certain letters patent under the great seal of the Duchy of Cornwall, if three persons, viz. the said W. Clayton, G. Clayton, and J. Medwin, the lives nominated in the said letters patent, should so long live; that the said W. Clayton being so possessed of the tenements and premises aforesaid for the residue of the said term of years so granted, afterwards, to wit, on the 1st August, 1789, by an indenture of lease then made between the said W. Clayton of the one part and John Ismay and John Harrison of the other part {profert}, the said W. Clayton, for the considerations therein mentioned, did demise, lease, and to farm let unto Ismay and Harrison all those two pieces or parcels of land situate &c. [describing them]—habendum to Ismay and Harrison, their heirs, executors, administrators, and assigns from the 24th June then last past for the term of sixty-four years and a quarter thence next ensuing and fully to be complete and ended, if the said W. Clayton, George Clayton, and James Medwin, the lives nominated in the letters patent from the Duchy of Cornwall of the said demised premises (inter alia) to the said W. Clayton, or if any other person or persons whose lives or life the said W. Clayton, his executors, administrators, or assigns, or the person or persons who at the time during the said term of sixty-five years and a quar-

Where the plaintiff's counsel stops the judge in the course of his summing up, because his opinion appears to be strongly adverse, and elects to be nonsuited, he cannot afterwards move for a new trial.

Lease to Ismay and Harrison.

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v.
CLAYTON.

Covenant by
the lessor, his
executors, &c.,
to apply for,
and do his and
their utmost en-
deavours to
procure a re-
newal of the
letters patent.

ter should be entitled to the beneficial interest of the then present or any future letters patent should procure to be nominated in any future letters patent of the thereby demised premises, should so long live, yielding and paying therefore the yearly rents in the said indenture mentioned: And the said W. Clayton, for himself, his heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree to and with Ismay and Harrison, their executors, administrators, and assigns, that he the said W. Clayton, his executors, administrators, and assigns, and all other person or persons who for the time being should be entitled to the said recited letters patent and the premises thereby demised, in order to confirm the said term thereby or intended to be thereby granted in the said premises to Ismay and Harrison, their executors, administrators, and assigns, absolutely, should and would from time to time when either of them the said W. Clayton, G. Clayton, and James Medwin, or any other person or persons whose life or lives should be nominated and appointed in any future letters patent in his or their place or stead, should happen to die or depart this life during the term of 65½ years, *apply for, and do his and their utmost endeavours to procure such renewal or renewals of such letters patent for another life or lives*, so as the said Ismay and Harrison, their executors, administrators, and assigns, might hold and enjoy all and singular the premises thereby demised to them or intended so to be for the whole of the said term of 65½ years thereby demised; subject only to the rents and covenants in the said indenture mentioned; and that without Ismay and Harrison, their executors, administrators, and assigns being compelled or compellable or liable to pay any part of the fine or fines that should be paid on such renewal; and also that, they the said Ismay and Harrison, their executors, administrators, or assigns paying the said yearly rent, and performing, fulfilling, and keeping all and singular

Covenant for
quiet enjoy-
ment during
the term.

the covenants, clauses, and agreements thereinbefore reserved and contained on the parts and behalfs of them the said Ismay and Harrison, their executors, administrators, or assigns to be paid, observed, performed, and kept, should and might peaceably and quietly have, hold, use, occupy, possess, and enjoy all and singular the premises thereby demised, or intended so to be, with their and every of their appurtenances, for and during the term thereby granted, without any let, suit, trouble, denial, interruption, ejection, eviction, or molestation of, from, or by the said W. Clayton, his executors, administrators, or assigns, or the persons or person who for the time being should be entitled to the said letters patent, or any other person or persons whomsoever lawfully claiming or to claim by, from, or under, or in trust for him, them, or any or either of them, or by or through his, their, or any or either of their consent, assent, neglect, default, privity, or procurement; as by the said indenture, on reference thereto, will appear: by virtue of which demise the said Ismay and Harrison, to wit, on the 1st August, 1789, entered into and upon all and singular the said demised premises with the appurtenances, and became and were possessed thereof for the said term so to them thereof granted as aforesaid. The declaration then proceeded to set forth various mesne assignments and demises, by virtue whereof the plaintiff ultimately became assignee of three fourths and one third of another fourth of and in the demised premises for the rest and residue of the said term of 65½ years by the said first-mentioned indenture granted; and that during that term, to wit, on the 11th October, 1828, G. Clayton, one of the persons so named in the said letters patent from the Duchy of Cornwall, and in the said first-mentioned indenture mentioned, died; and afterwards and during the said term by the said first-mentioned indenture granted, to wit, on the 30th November, 1833, J. Medwin, another of the persons so named in the said letters patent and in the said first-

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Averment that Ismay and Harrison entered and became possessed; and that, after various mesne assignments, they became vested in the plaintiff.

Death of G. Clayton, the first life.

Death of J. Medwin, the second life.

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Death of Sir
W. Clayton,
the third life.

Averment that
no other person
or persons was
or were nomi-
nated in the
place of G.
Clayton, &c.

Performance by
plaintiff.

Breach, that
the lessor did
not apply for
and do his
utmost endea-
vours to pre-
cure a renewal
of the letters
patent.

* Quære.

Special da-
mage.

mentioned indenture, died; and afterwards and during the said term by the first-mentioned indenture granted, to wit, on the 28th January, 1834, Sir W. Clayton, in the said first-mentioned indenture mentioned, and being the said party thereto, died: that no other person or persons were during any part of the time aforesaid, either before or after the making of the said first-mentioned indenture until the death of the said Sir W. Clayton, nominated and appointed in any letters patent from the Duchy of Cornwall of the said demised premises in the place or places or stead of the said G. Clayton, J. Medwin, or either of them, according to the meaning and intent of the said first-mentioned indenture: and, although the plaintiff had performed all things in the said first-mentioned indenture mentioned on his part and behalf as such assignee as aforesaid to be performed and fulfilled; yet the said Sir W. Clayton in his lifetime, not regarding his said covenant in that behalf so made as aforesaid, did not nor would either on the death of the said G. Clayton, or the said J. Medwin, in order to confirm the said term by the said first-mentioned indenture granted in the said premises to the said Ismay and Harrison absolutely, apply for and do his utmost endeavours to procure a renewal of the said letters patent in the said first-mentioned indenture mentioned for another life or lives, so as *the plaintiff* might hold and enjoy the said demised premises in and by the said first-mentioned indenture demised to him for the whole of the said term of the 65½ years, subject only to the rents and covenants in the said indenture contained, but wholly neglected and refused so to do; that thereupon, and by reason thereof, and on the death of the said Sir W. Clayton, the said term by the said first-mentioned indenture granted, ceased and became and was ended and determined: By means of which said several premises the plaintiff had lost and been deprived of all the rents, profits, benefits, and advantages which would have

arisen and accrued to him from the performance of the said covenant of the said Sir W. Clayton in that behalf so made, and so broken as aforesaid, and from the existence and continuance of the said term by the said first-mentioned indenture granted, and which rents, &c. would have amounted to a large sum of money, to wit, 10,000*l.*; and also by means of the premises the plaintiff had lost and been deprived of the use and benefit of divers sums amounting, to wit, to 2,000*l.* in and about the improving, repairing, and benefiting the said premises during the said term; and the plaintiff had been and was by means of the premises otherwise much injured and damaged; as the plaintiff in fact said that the said Sir W. Clayton had broken the covenant so by him made as aforesaid.

The defendant pleaded that the said Sir W. Clayton did, on the death of G. Clayton and J. Medwin respectively, in order to confirm the said term by the said first-mentioned indenture granted in the said premises to Ismay and Harrison absolutely, *apply for and do his utmost endeavours to procure a renewal of the said letters patent in the said first-mentioned indenture mentioned for another life and lives*, so as the plaintiff might hold accordingly the said demised premises in and by the said first-mentioned indenture demised as aforesaid for the whole of the said term of 65½ years, subject only to the rents and covenants in the said indenture contained, according to the tenor, and effect, true intent, and meaning of the said first-mentioned indenture, and of the said covenant of said Sir W. Clayton by him in that behalf made as aforesaid. Upon this plea the plaintiff joined issue.

The cause was tried before Park, J., at the last Summer Assizes for the county of Surry. The facts were as follows:—Sir W. Clayton held under letters patent from the Duchy of Cornwall about eighty-seven acres of land in the parish of Lambeth for a term of ninety-nine years from Michaelmas, 1777, provided three persons therein named

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Plea, that the lessor did, on the death of G. Clayton and J. Medwin, apply for and do his utmost endeavours to procure a renewal of the letters patent.

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(G. Clayton, J. Medwin, and W. Clayton) should so long live. Sir W. Clayton granted an under-lease of a portion of the land in question to Ismay and Harrison for a term of sixty-five years and a quarter, if the cestuis que vie should so long live, covenanting with Ismay and Harrison and their assigns, that, when any of the cestuis que vie should die within the term, he, his heirs &c., would apply for and use his utmost endeavours to procure a renewal of the letters patent, and that without the under-lessees paying any portion of the fine for such renewal. The term and interest granted to Ismay and Harrison, by various mesne assignments, became vested in the plaintiff.

On the 11th October, 1828, G. Clayton, one of the lives, died; in November, 1833, J. Medwin, died; and in January, 1834, Sir W. Clayton died: whereupon the whole interest of the Clayton family in the property ceased.

On the death of G. Clayton, it became the duty of the lessor, in pursuance of his covenant, to use his best endeavours to obtain the substitution of another life: and the question in the cause was whether or not he had so done; it being agreed that he was bound to apply for a renewal, and to pay such fine thereon as the renewal was reasonably worth. The only evidence offered on the part of the defendant to shew that the lessor had used his utmost endeavours to procure a renewal of the letters patent, consisted of a memorial for the insertion of another life, presented to the Duchy on the 17th October, 1828, and a bill in equity; which, after three years' negotiation, terminated in an offer to renew upon payment of a fine of 64,200*l.* This fine was the result of surveys and calculations made by several surveyors and actuaries of eminence, and was assessed at three years' purchase upon houses producing a rent of 20*l.* per annum, and at two and a half years' purchase upon houses of a less value. The defendant offered to pay 30,000*l.*; but his offer was rejected. Various letters patent under which the Clayton family had

held the property from the time of Charles the Second, were put in by the defendant, with a view to contrast the amount of the fines paid upon the successive renewals, with that demanded upon the present occasion. These were objected to on the part of the plaintiff as inadmissible: but the learned judge received them. On the part of the defendant it was contended that the fine he was bound to pay on the renewal should be calculated upon an estimate of his own beneficial interest in the premises, and not of that of the undertenants. The plaintiff's counsel proposed to prove, by the evidence of surveyors and actuaries, that the fine demanded by the Duchy was reasonable; and that the property had since been taken by other parties at a much higher amount of fine. The learned judge refused to admit this evidence, observing that the only issue to be tried was whether or not the defendant had used reasonable exertions to procure a renewal of the letters patent.

The learned judge in his summing up told the jury that the only question for their consideration was whether or not the defendant had used due exertions to obtain a renewal of the letters patent, regard being had to the amount of the fine demanded for such renewal; and that he was not bound to pay an unreasonable sum: and he was proceeding to comment upon the evidence, expressing himself somewhat freely as to the irrelevancy of the evidence of the value of the property offered on the part of the plaintiff; when the plaintiff's counsel, after an ineffectual attempt to persuade the judge that the principle upon which the defendant estimated the reasonableness of the fine was incorrect, elected to be nonsuited.

Shea, in Michasmas Term last, moved for a new trial.—Notwithstanding his having elected to be nonsuited, the plaintiff is still under certain circumstances entitled to move for a new trial. [*Tindal*, C. J.—It must be a very strong case.] The cases of *Bulter v. Dorant*, 3 Taunt. 229,

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Robinson v. Cook, 6 Taunt. 336, and *Elwerthy v. Bird*, M'Clel. 69, decided, that, where the plaintiff's counsel acquiesces in or elects to be nonsuited, he cannot afterwards have a new trial. But these cases have since been overruled. In *Alexander v. Barker*, 2 C. & J. 183, it was held that submitting to a nonsuit in deference to the opinion of the judge (which opinion was incorrect) did not estop the plaintiff from moving to set aside such nonsuit. Bayley, B., there says: "I have heard Lord Tenterden say, over and over again, that, if he nonsuited upon an opinion intimated at the trial, in which the counsel acquiesced, and was wrong, the court ought to set aside that nonsuit. It would be very hard if it were otherwise, because counsel must in that case at their peril decide whether the judge was right or wrong." In *Vacher v. Cocks*, 1 B. & Ad. 145, the plaintiff's counsel insisted upon being nonsuited. Lord Tenterden said: "A judge ought not to nonsuit if there is any evidence for the consideration of the jury on behalf of the plaintiff; because, if the facts went to the jury, they might possibly in their discretion find a verdict for him. Here, the plaintiffs insisted on a nonsuit: they were entitled to do so; but, if there was any evidence on which the jury might in their discretion have found a verdict for the defendants, the nonsuit by which that evidence was withdrawn from the jury's consideration ought not now to be set aside at the instance of the plaintiffs." In the present case there was no evidence to warrant a verdict for the defendant; and the evidence offered for the plaintiff was either rejected or so materially weakened in its effect by the strong observations of the learned judge, that the plaintiff's counsel were fully justified in the course they adopted. [*Gaselee, J.*, referred to *Palmer v. Marshall*, 1 M. & Scott, 454, where the plaintiff elected to be nonsuited, and afterwards applied to the court for a new trial on the ground of misdirection, and no objection was taken to his right to move.]

Theisiger and *Platt* shewed cause.—Where the nonsuit is the act of the judge, no doubt the court will in a proper case interfere. But here the trial was rendered abortive by the plaintiff's own act: he improperly withdrew the case from the consideration of the jury; and therefore he has no right now to come and ask the court to set aside the nonsuit. *Butler v. Dorant* is precisely in point, and has never been overruled. There, on a special agreement made on the sale of a share in the secret of making Barkley's antibilious pills, whereon the defendant agreed annually to expend 1000*l.* in advertisements, the breach assigned was the not having expended that sum. Upon the trial, after the case was closed on both sides, the judge was proceeding in his summing up to direct the jury that the plaintiff, not having distinctly proved any special damage arising from the breach, was entitled to nominal damages only; whereupon Best, Serjeant, for the plaintiff, elected to be nonsuited. He afterwards moved for a new trial on the ground of misdirection. Lawrence, J., said: "His lordship did not say you should be nonsuited; he directed the jury that you should have nominal damages only; but you did not choose to trust your case with the jury. If there were a misdirection, you should have abided the verdict, and have reserved the objection for a motion for a new trial. I believe this has never been done, that a counsel shall lie by until he hears the opinion of the judge at *Nisi Prius*, and that if he thereupon chooses to be nonsuited, he shall come to the court to set aside his own act." Mr. Baron Wood, in *Ward v. Mason*, 9 Price, 295, lays down the rule very distinctly in these terms: "If the plaintiff chooses to submit to the opinion of the judge, without letting the case go to the jury, he certainly may do so, and that will be binding on him; but no man is obliged to submit to be nonsuited on the opinion of the judge upon the weight or sufficiency of the evidence which he brings for-

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ward to support his case. The judge may direct the jury on it, according to the opinion which he may have formed; and, if the jury adopt it, the party is concluded by their verdict; or, in order to avoid that, the party may submit to be nonsuited. In that case, most assuredly he would not be permitted to move to set the nonsuit aside." *Vacher v. Cocks* is an authority rather in favour of the defendant. There, the judge, in summing up the case, directed the jury, if they came to a certain conclusion, to give their verdict for the plaintiff; but, if they came to either of two other conclusions, which he pointed out, to find for the defendant, and state on which ground their judgment was formed. The plaintiff then chose to be nonsuited: and it was held that he was not entitled to a new trial on account of misdirection, if either of the two latter points was rightly put to the jury.

Shee, in support of his rule.—A nonsuit can in no case be said to be the act of the judge; it is in every case the act of the party: and no distinction can be laid down between acquiescence, election, submission, and insisting. This case is not to be distinguished from *Alexander v. Barker*. All the cases shew that there are circumstances that will warrant the setting aside a nonsuit in which the plaintiff's counsel has felt it to be his duty, in deference to the judge, to acquiesce at the trial. Treating the greater part of the plaintiff's evidence as either inadmissible or immaterial to the issue, was in effect the same as directing a nonsuit. The plaintiff is equally entitled to a new trial if there was no evidence on which the jury would be entitled to find for the defendant. [*Tindal, C. J.*—For misdirection in matter of law, a bill of exceptions only lies.] Although it is true the learned judge had not finished his summing up, enough had been said to shew the strong bias of his opinion, in which the plaintiff's counsel could do no other than acquiesce.

TINDAL, C. J.—I am of opinion that this rule ought to be discharged. The general rule of law is, that, where in the progress of the trial the plaintiff's counsel chooses to withdraw the case from the consideration of the jury, he cannot afterwards come to the court and ask for a new trial. There are, however, certain exceptions to this rule; as, where the judge who presides at the trial intimates a strong opinion that the plaintiff ought to be called, or refuses to receive evidence tendered, or misdirects the jury in point of law, and the plaintiff's counsel, deferring to the opinion of the judge, elects to be nonsuited—the court will deal out to the parties the same measure of justice as if the cause had proceeded uninterruptedly to its conclusion. Such was the case of *Alexander v. Barker*, where it was held that submitting to a nonsuit in deference to the opinion of the judge at the trial (which opinion was incorrect) did not estop the plaintiff from moving to set aside such nonsuit. There, the nonsuit proceeded upon a mistaken view of the case. But, so far from that being so here, I can scarcely conceive a case more foreign in its circumstances from the authority just adverted to: it appears that the learned judge was proceeding to sum up the evidence to the jury, when the counsel for the plaintiff interposed, and desired that he might be nonsuited. It was a mere voluntary election. I have heard of no wrong direction; nor of any evidence having been improperly rejected: the utmost extent of the argument is, that the judge, from time to time as he proceeded, expressed an opinion on the weight of the evidence. This he had a perfect right to do. Even if the judge, in the expression of his opinion upon the effect of the evidence as one of the jury, were mistaken in point of fact, that would afford no ground for a motion. It cannot be necessary to cite any authority for so indubitable a position: if it were so, *The Attorney-General v. Goad*, M'Clel. & Y. 286, is precisely in point. It was there held that the due degree of weight to be given by a judge

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in directing the jury to particular evidence which had been properly admitted, must be left to his own discretion, and his discretion in this respect cannot be revised by the court. Hullock, B., there says: "I think that the evidence was admissible, and ought to have been left to the jury. If that be so, and the case were sent down again for trial, it would be again admitted. Therefore the only ground remaining is, that too great effect was given to the evidence in the learned judge's direction. I apprehend that that would be a new ground for granting another trial, and would open a door to applications for that purpose to an extent incalculable. I am at a loss to know by what rule the precise quantum of force which should be attached by a judge to a particular piece of evidence on a trial is to be measured." When the plaintiff's counsel saw the strong impression of the judge against them, and that the like feeling seemed to pervade the minds of the jury, I am far from saying they exercised an unwise discretion in withdrawing from the contest: but, if any one is to suffer from the exercise of that discretion, it clearly ought not to be the defendant.

PARK, J., declined to give any opinion.

GASELBE, J., was absent.

BOSANQUET, J.—It does not appear to me that there is any ground for saying that the jury were misdirected: the very question about which the parties were contending was precisely put—whether the fine demanded was reasonable or not. The learned judge may have thought the evidence on the one side stronger than that on the other; and, seeing that he entertained that impression, and that the jury were also imbibing it, the plaintiff's counsel may have acted wisely in withdrawing. The judge's opinion as to the weight of evidence, even if it leads him to give utter-

ance to expressions that are not strictly warranted by the facts, affords no ground for a motion for a new trial—*The Attorney-General v. Good*. The plaintiff is not estopped from trying the question again.

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Rule discharged.

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Wednesday,
Jan. 20th.

THE declaration stated that the defendant, before and at the time of the making the agreement thereafter mentioned, was possessed of a certain horse called Partington; and thereupon afterwards, by a certain agreement bearing date the 27th February, 1835, then made between the plaintiff and the defendant, the plaintiff agreed to buy and the defendant agreed to sell his horse Partington to the plaintiff for the sum of 200*l.*, provided he trotted eighteen miles within one hour, and that to be done within one month from that day, and Joseph Norcliffe, of Ossett, to be the judge of the performance; if the task was not performed, the horse was thereby sold to the plaintiff for the sum of one shilling, which the plaintiff that day paid to the defendant: and thereupon afterwards, to wit, on &c., in consideration that the plaintiff, at the special instance and request of the defendant, had promised the defendant to perform and fulfil all things in the said agreement contained on the plaintiff's part to be performed, the de-

The plaintiff declared upon an agreement whereby the plaintiff agreed to buy and the defendant agreed to sell a horse to the plaintiff for 200*l.*, provided he trotted eighteen miles within one hour, within one month from the date of the agreement, and J. N. to be the judge of the performance; and if the task was not performed the horse was agreed to be thereby sold to the plaintiff for one shilling—averring that the horse was tried by the defendant in the presence of J.

N., and failed. The defendant pleaded, amongst other things, that the horse could and would have trotted the required distance within the hour but *one A. B.*, then being the servant of the plaintiff, wrongfully and wilfully as the servant and agent of the plaintiff, interrupted the trotting of the horse, &c. The plaintiff replied, that A. B. did not, as the servant or agent of the plaintiff, interrupt the trotting of the horse, &c.:—Held, that the allegation in the plea was properly traversed.

The defendant further pleaded, that, after the trial in the declaration mentioned, and within one month from the date of the agreement, to wit, on &c., he was ready and willing to try the horse, and gave reasonable notice to the plaintiff and J. N. of such intended trial, and of the time and place at which the same was to take place; and that J. N. was requested by the defendant to be the judge of the performance at such trial; but that J. N. then and at all times afterwards during the month refused to attend; whereby the horse was prevented from trotting in the presence of J. N. eighteen miles within the time limited:—Held ill, on special demurrer: for that, inasmuch as the condition the performance of which was to entitle the defendant to the advanced price was a condition for his benefit, the onus of procuring its performance rested upon him.

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defendant then promised the plaintiff to perform and fulfil all things in the said agreement contained on his the defendant's part to be performed and fulfilled: and the plaintiff averred that he had always from the time of making the said agreement been ready and willing to perform and fulfil the same, and, in part performance of the same, did, on the 27th February, 1835, pay to the defendant the sum of one shilling in the said agreement mentioned, which the defendant then accepted and received; that, after the making of the said agreement, and within one month from the day of the date thereof, to wit, on the 16th March, 1835, the said horse was tried by the defendant in the presence of the said J. Norcliffe to trot eighteen miles within one hour, but that the said horse did not then, in the judgment of the said J. Norcliffe, nor did in fact then or at any other time within one month from the day of the date of the said agreement, trot eighteen miles within one hour; whereby the defendant became liable to deliver and ought to have delivered to the plaintiff the said horse, according to the true intent and meaning of the said agreement: and the plaintiff, afterwards, to wit, on the 1st May, 1835, demanded the said horse of and from the defendant, and required him to deliver the said horse to the plaintiff: yet the defendant, not regarding the said agreement, nor his said promise so made as aforesaid, did not nor would when the said horse was so demanded by the plaintiff, and the defendant was requested to deliver the said horse to the plaintiff as aforesaid, deliver the said horse to the plaintiff, nor had the defendant yet delivered the said horse to the plaintiff, but had hitherto wholly refused and neglected so to do, to the damage of the plaintiff of 200*l*.

First plea.

Pleas—First, that the horse was not tried in the presence of J. Norcliffe, as alleged in the declaration: whereupon issue was joined—Secondly, that, at the said trial in the declaration mentioned, the said horse could and

Second plea.

would have trotted eighteen miles within one hour, but one A. B., then being the servant of the plaintiff, and who was then present at the said trial, after the commencement of the said trial in the declaration mentioned, and during the progress thereof, to wit, on &c., wrongfully and wilfully, as the servant and agent of the plaintiff, interrupted the trotting of the said horse, and hindered and prevented the horse from trotting the said eighteen miles within one hour; and this the defendant was ready to verify &c.—Thirdly, that, after the making of the said agreement in the declaration mentioned, and after the said trial therein also mentioned, and also within one month from the date of making the said agreement, to wit, on the 25th March, 1835, the defendant was ready and willing to try the said horse in the declaration mentioned to trot eighteen miles within one hour on that day, and the said horse could and would have done the same; and the defendant within a reasonable time next before the day and year last aforesaid gave the plaintiff and the said J. Norcliffe notice of such intended trial, and of the time and place at which the same was to take place; and the said J. Norcliffe was then requested by the defendant to be the judge of the performance of the said horse at the said trial; but that the said J. Norcliffe then and at all times afterwards during the said space of one month refused to attend and did not attend to be the judge of the performance of the said horse at the said intended trial; whereby the said horse was prevented from trotting in the presence of the said J. Norcliffe as judge eighteen miles within one hour within one month from the day of the making of the said agreement; and this the defendant was ready to verify &c.—Fourthly, that the said trotting and performance in the declaration mentioned was meant and intended to be a trotting race or match against time on a certain public highway of our lord the king for all the liege subjects of our lord the king to go, return, pass,

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and re-pass on foot and with cattle and carriages at all times of the year at their free will and pleasure, to the great nuisance, danger, hindrance, and obstruction of all such liege subjects of our said lord the king as were or might be passing and re-passing in, by, and along the said common king's highway: by means whereof the said agreement in the declaration mentioned was and is void and of no effect, and contrary to law; and this the defendant was ready to verify, &c.

Replication to
the second plea.

Replication to the second plea—That the said person in the second plea in that behalf mentioned or referred to did not as the servant or agent of the plaintiff interrupt the said trotting of the said horse, or hinder or prevent the horse from trotting the said eighteen miles within one hour, in manner and form as the defendant had above in his second plea in that behalf alleged—concluding to the country.

Demurrer to the
third plea.

Demurrer to the third plea, assigning for causes—that, the said J. Norcliffe having once judged of the trotting of the horse therein mentioned, it was the duty of the defendant, if he again wanted him, to have secured the attendance of the said J. Norcliffe; at all events, that, by the agreement in the declaration mentioned, the said horse became the plaintiff's for one shilling if he did not trot eighteen miles within one hour as therein mentioned; and that, if the defendant wished the plaintiff not to have the horse for that sum, he should have secured the attendance of the said J. Norcliffe to judge whether the said horse trotted that distance within the time prescribed, in which case the defendant would have been entitled to the larger sum; that the attendance of the said J. Norcliffe being for the benefit of the defendant, he was bound to have enforced it; and that the horse, not having in fact trotted the prescribed distance within the prescribed time, belonged to the plaintiff.

Replication to
the fourth plea.

Replication to the fourth plea—That the agreement in

the declaration mentioned was and is a certain agreement in writing bearing date the 27th February, 1835, signed by the plaintiff and the defendant respectively, and containing therein the matters following, and no other, that is to say—"Agreed to sell my horse Partington to Mr. John Brogden, of Manchester, for the sum of 200*l.*, provided that he trots eighteen miles within one hour; and that to be done within one month from this day; and Mr. J. Norcliffe, of Ossett, to be the judge of the performance: if the above task is not performed, the horse is hereby sold to the said John Brogden for the sum of one shilling, which he has this day paid to me. Witness our hands this 27th day of February, 1835. Thomas Marriott, John Brogden:" without this that the said trotting and performance in the declaration mentioned was meant and intended to be a trotting race or match against time on the said public highway in the last plea mentioned, to the great nuisance, danger, hindrance, and obstruction of all the liege subjects of our lord the king passing and re-passing along the same—concluding to the country.

The defendant joined in the demurrer to the third plea, joined issue upon the replication to the last plea, and demurred to the replication to the second plea, assigning for causes—that the said replication put in issue two distinct facts, each of which by itself would amount to a sufficient and perfect answer to the plea, viz. as well that the said person in the plea mentioned was the servant or agent of the plaintiff as that the said person interrupted the trotting of the said horse; whereas it would be a sufficient replication to the plea either to have traversed the allegation that the said person did interrupt the trotting of the horse, or to have denied that the said person acted as agent for or on behalf of the plaintiff; and also for that the replication was ambiguous, and pregnant with doubt whether the plaintiff intended to put in issue the fact of the said person in the plea mentioned being servant or

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agent of the plaintiff, or the fact of such person's interrupting the trotting of the horse. Joinder.

Milner, in support of the demurrer to the third plea, urged the grounds of demurrer therein set forth; and, in support of the replication to the second plea, submitted, that, the whole of the plea forming but one connected proposition, the plaintiff in his replication could only take issue upon it as he had done, following precisely the language of the plea.

Bayley, contra.—The third plea is insufficient. The defendant had the entire month within which to trot the horse the required distance in the hour: the agreement does not confine him to one trial. The wrongful refusal of the judge to attend was not the act of the defendant: the plaintiff was equally bound to procure his attendance. Then, the replication to the second plea is bad for duplicity. If the party who was in the plea alleged to be the servant of the plaintiff was the servant of the plaintiff, and did not interrupt the performance; or if that individual did interrupt the performance, but was not the plaintiff's servant; in either event the plea would be disproved; and therefore the issue should have been confined to one of those facts. *Moore v. Boulcott*, ante, Vol. 1, p. 123, 1 New Cases, 323, is an authority in point. There, to assumpsit for work and labour as an attorney, the defendant pleaded that the demand was for charges "at law and in equity," and no bill delivered: the plaintiff replied, that the charges mentioned in the declaration were not for charges "at law and in equity:" it was held, on special demurrer, that the replication was ill, though following the words of the plea: the plaintiff should have traversed disjunctively, in the words of the statute. [He was proceeding to argue that the contract was illegal within the statutes of gaming: but the court held, that, as no such point had been marked

for argument in the margin of the demurrer books, he was precluded from it.]

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TYNDAL, C. J.—It appears to me that the third plea is bad in point of law. To decide this question, it becomes necessary to look at the contract between the parties, and to see its nature. It is a contract under which the plaintiff becomes the purchaser at the price of one shilling (which has been paid to and received by the defendant) of a horse belonging to the defendant. The sale is made subject to a condition: and the first question that arises is, whether that condition is a condition precedent or a condition subsequent. It appears to me to be a condition subsequent. The horse was sold to the plaintiff for one shilling, subject to a condition that the plaintiff should pay 200*l.* for him provided he should within a month, to the satisfaction of a person named, trot eighteen miles within one hour. It was therefore the business or duty of the defendant to state upon the record that the condition, the performance of which would entitle him to receive the 200*l.*, either was performed or its performance was prevented by the act of the plaintiff. It appears to me that he has done neither. The declaration states, that, after the making of the agreement, and within one month from the day of the date thereof, the horse was tried by the defendant in the presence of Norcliffe, to trot eighteen miles within one hour, but that the said horse did not then, in the judgment of Norcliffe, nor did in fact then or at any other time within one month from the day of the date of the said agreement, trot eighteen miles within one hour. And the third plea contains no allegation that the trial ever did take place at all; but merely states that the defendant was ready and willing to try the horse, and gave notice to Norcliffe, who refused to attend. Neither is there any allegation in this plea that the plaintiff had any hand in preventing the attendance of Nor-

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Second plea.

cliffe. That Norcliffe did not attend, was no fault of the plaintiff's. It was for the defendant, who sought to obtain a higher price for the horse, in consequence of his extraordinary power and speed, to procure the attendance of the umpire, or to shew that his attendance was prevented or the performance interrupted by the wrongful act of the plaintiff. The next objection arises upon the issue taken upon the second plea. That plea appears to me to be informal, but upon a point that is not assigned as a cause of demurrer, and therefore one that cannot be taken advantage of now. It states, that, at the said trial in the declaration mentioned, the said horse could and would have trotted eighteen miles within one hour, but one A. B., then being the servant of the plaintiff, and who was then present at the said trial, after the commencement of the said trial in the declaration mentioned, and during the progress thereof, wrongfully and wilfully, as the servant and agent of the plaintiff, interrupted the trotting of the said horse, and hindered and prevented the horse from trotting the said eighteen miles within one hour. Now, to make that plea valid, the defendant should have alleged that the obstruction took place *by the command of the plaintiff*. Instead of that he merely states that the horse could and would have trotted eighteen miles within one hour, but one A. B., then being the servant of the plaintiff, and who was present at the trial, during its progress, wrongfully and wilfully, *as the servant of the plaintiff*, interrupted the trotting of the horse, and hindered and prevented him from trotting the required distance within the hour. That allegation might be satisfied at the trial by proof that A. B. was in the employ of the plaintiff, and, being present at the trial, obstructed the performance, without shewing that it was done by the command of the plaintiff. The plaintiff, in his replication to the second plea, says that the said person in the second plea in that behalf mentioned or referred to did not as the

servant or agent of the plaintiff interrupt the said trotting of the said horse, or hinder or prevent the horse from trotting the said eighteen miles within one hour, modo et forma—precisely following the language of the plea. The case appears to me to be very distinguishable from *Moore v. Boulcott*: because there the plaintiff in his replication put a different construction upon the statute relating to the taxation of attornies' bills from what the law warrants; the defendant having pleaded that the bill delivered by the plaintiff was for work at law *and* in equity, the plaintiff in his replication traversed that allegation in its precise words; whereas he should have traversed in the alternative, that the bill was for work at law *or* in equity, either of which being found against him would have entitled the defendant to succeed.

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PARK, J., merely expressed his concurrence.

GASELEE, J.—I am of the same opinion. The argument urged on the part of the defendant amounts to this—that the plaintiff was bound to procure the attendance of Norcliffe at any moment during the month to witness as many trials as the defendant might chuse; which clearly is not consistent with the intention of the parties. As to the second plea, the effect of the allegation is that the interruption was caused by the plaintiff's command, and I think it is properly traversed. Inasmuch as the illegality of the contract is not specifically pointed out as a cause of demurrer, or as a point for argument, we are prevented by the rules of the court from entering into it now. As, however, that question is raised by the fourth plea, it will be matter for discussion on a future occasion.

BOSANQUET, J.—The horse was sold for a shilling, subject to a condition that the defendant should receive 200*l.* provided the horse, within one month from the date of

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the contract, and to the satisfaction of Norcliffe, trotted eighteen miles within one hour. It was therefore the interest of the defendant to see that the trial was had which would entitle him to the 200*l.*, and it was his duty to procure the attendance of Norcliffe. It is said that the replication to the second plea is double, and that it would have been sufficient for the plaintiff to traverse either that the person mentioned in that plea was the servant of the plaintiff, or that the trotting was interrupted. Every person who is employed by another may be his servant: but, unless the party in the plea named were the plaintiff's servant in that behalf, that is, did the act by his command, the plea would afford no defence; and a mere denial of the fact of the trotting having been interrupted would not be a safe traverse, for the interruption might have been effected by a stranger.

Judgment for the plaintiff on the third plea,
 and on the replication to the second plea.

Bayley applied for leave to amend: but the court refused it.

Wednesday,
Jan. 8th.

"Agreed to sell my horse P. to J. B. for 200*l.* provided he trots eighteen miles within one hour, and that to be done within one month from this day, and N. to be the judge of the performance; if the above task is not performed, the horse is hereby sold to the said J. B. for one shilling, which he has this day paid to me:"—Held, an illegal wager within the 9 Anne, c. 14.

At the trial before Lord Denman at the Spring Assizes at York, 1836, it appearing that the trial of the horse took place, but that the umpire, Norcliffe, did not witness the entire performance, he having merely attended to see the horse start and come in—it was contended on the part of the defendant that this trial did not satisfy the terms of the agreement, and that the plaintiff ought, in support of his allegation, to have shewn that Norcliffe was present throughout the trial.

A verdict having been found for the plaintiff, damages

180*l.*, with liberty to the defendant to move to enter a nonsuit on the ground above stated—

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Cresswell, in Easter Term moved accordingly, and also in arrest of judgment.—He submitted that this was not a bona fide contract of sale, but in effect an illegal wager—a bet of 200*l.* to one shilling that the horse would not trot eighteen miles within the hour.

Alexander and Milner shewed cause.—The trotting of the horse eighteen miles within the hour was a condition for the benefit of the defendant, not for that of the plaintiff: it was no part of the plaintiff's case; he claimed the horse at the price he had paid for it; it was for the defendant to shew that he was entitled to demand the higher price stipulated for, by proving the performance of that upon which his right to receive such higher price was made to depend. In substance and effect the horse was tried in the presence of Norcliffe: it was not necessary, and indeed not possible, for him to accompany the horse throughout the distance.—Undoubtedly, if this be a wager, it is without the protection of the statute 13 Geo. 2, c. 19. But it is not a wager: it is a mere bargain to pay for a horse a given sum in one event, and a certain other sum in another event. Suppose the contract had been for the sale of a steam-engine of a given power for a certain sum, with a condition that, as the engine might be useless to the purchaser if of a smaller power, he should in that event pay but a nominal price for it: could that be said to be a wager or bet upon the powers of the engine? If any case can be suggested in which this would not be an illegal wager, the judgment cannot be arrested.

Bayley, in support of the rule.—This is a gaming contract, and therefore illegal. Horse-racing where the stake exceeds 50*l.* is legalized by the statutes 13 Geo. 2,

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c. 19, and 18 Geo. 2, c. 34; but a wager for a sum exceeding 10*l*. on a horse-race, whether such race be legal or not, is still void by the statute 16 Car. 2, c. 7, s. 3 (a). If this be put as a horse-race, therefore the contract is clearly illegal and void. And if it be not a betting at a horse-race, and within that enactment, it is an illegal game within the 9 Anne, c. 14 (b). Suppose the agreement to have been that the price of the horse should be regulated by the result of a game at picquet or whist, could any body doubt that that would be an illegal mode of paying for the animal?

TINDAL, C. J.—In the view I take of this case, it is unnecessary to say anything except as to the objection that arises upon the face of the record: for, if the contract falls within the mischief of the statute of 9 Anne, c. 14, it follows that no action upon it can be supported; but, before we can arrest the judgment, the illegality of the contract must appear by fair inference upon the face of the record itself. By the contract declared upon and set forth in the replication to the fourth plea, it appears that the property in the horse was transferred by the defendant to the plaintiff, and that the price to be paid for it was made to depend upon a certain condition: and the question is whether such price was not to be determined upon the result of an illegal game within the meaning of the 9 Anne, c. 14. The contract is in the following words:—
 “Agreed to sell my horse Partington to Mr. John Brogden, of Manchester, for the sum of 200*l*., provided that he trots eighteen miles within one hour, and that to be done within one month from this day; and Mr. J. Norcliffe, of Ossett, to be the judge of the performance; if the above task is not performed, the horse is hereby sold to the said John Brogden for the sum of one shilling, which he has

(a) See *Shillito v. Theod.* 5 M. 309; *Clayton v. Jennings*, 2 W. & P. 303, 7 Bing. 405. Bl. 706.

(b) See *Blaxton v. Pye*, 1 Wils.

this day paid to me." Thus, on the event of the trotting against time is made to depend whether the plaintiff should have for one shilling a horse worth 200*l.*, or pay the value of it. On the one hand, if the horse accomplished the distance within the stipulated time, the plaintiff was to pay the defendant 200*l.*, and, on the other hand, the defendant, who was the owner of the horse, provided he lost the wager, would have to give up to the plaintiff a horse worth 200*l.* for one shilling. Bringing all one's faculties to bear upon the contract, it is impossible to construe it otherwise than as a contract, the main condition of which was to be determined by the event of a trotting match against time. With respect to the case put of a contract for a steam-engine of a given power, it is enough to say that such a contract is not provided for or avoided by any statute. This, however, in my opinion, is clearly a wager, in which the sum at stake exceeds 10*l.*, within the mischief intended to be remedied by the statute of Anne. Considering the relative situations in which these parties stand, I do not much regret that I feel compelled to come to this determination: they have engaged in a second race—a suit at law—in which race both are distanced, as they deserve to be. The judgment must be arrested.

PARK, J., signified his concurrence.

GASELEE, J.—Upon the state of these pleadings, I am not prepared to concur in the view taken by the rest of the court. It strikes me that the proper course would have been to have left it to the jury to say whether or not the contract was a device to evade the statute. The case of *Lynall v. Longbotham*, 2 Wils. 36, a little fortifies this position. It was there held, that a foot-race is a game within the statute 9 Ann.; but, if it do not appear that a man was playing at an illegal game, a wager of above 10*l.* laid upon his side, is not a betting within the statute. And Lord Chief Justice Willes said: "It is agreed on all

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hands that a foot-race is a game within the statute of 9 Ann., and therefore the single question is, whether it appears that Clarke was playing at a game called a foot-race, for, if he was, there was a betting within the statute; but it is neither laid in the declaration, nor stated in the case, that he was playing at a game called a foot-race, and we can intend nothing that does not appear; there must be a betting on the side of a person playing: and if no case had been stated, the judgment must have been arrested upon this declaration, because it is not laid that Clarke was *playing*. I think this is a penal law, and not merely remedial."

VAUGHAN, J.—I agree with my Lord Chief Justice and my Brother Park in thinking that the judgment in this case ought to be arrested. If the matter stood in doubt upon the face of the record, I admit the question should have been left to the jury: but if, from what appears upon the record itself, we can see that the contract involves an illegal wager, we are bound to decide that in point of law the action is not maintainable. I think it is impossible to look at this record without seeing that the contract is illegal, and within the 16 Car. 2, c. 7, and within the decided cases. This was as much a wager as that in *Ximenes v. Jaques*, 6 T. R. 499, where it was held that no action will lie on a wager that the plaintiff could perform a certain journey with a post-chaise and pair of horses within a given time. On the face of the record I am perfectly satisfied that this was an illegal wager within the 9 Anne, c. 14; and I am also of opinion that it was an illegal game within the 16 Car. 2, c. 7, s. 3.

Rule absolute to arrest the judgment (c).

<p>(c) In <i>Thornton v. Thackray</i>, 2 Y. & J. 156, it was held, that, though a judge may refuse to try a cause upon a wager where the parties have no interest, it is no</p>	<p>ground for arresting the judgment after verdict that the subject of the action was a wager between A. and B. upon the solvency of C., in which they had no interest.</p>
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DOE *d.* ROBINS *v.* THE WARWICK AND BIRMINGHAM CANAL COMPANY.*Thursday,
Jan. 21st,*

THIS was an action of ejectment brought to recover a quarter of an acre of land, through which ran a cut or feeder for supplying water to the Warwick and Birmingham Canal from an adjoining reservoir; and the question was whether the soil itself, or only an easement through it, belonged to the company.

By the 20th section of the 33 Geo. 3, c. 38, under which the company was incorporated, it is enacted—
“That, after any parts of lands or grounds shall be set out and ascertained for making the said canal, reservoirs, basins, and other the purposes and conveniences therein-before mentioned, it shall be lawful for every person or persons who are or shall be seised, possessed of, or interested in any lands or hereditaments which shall be set out and ascertained as aforesaid, to contract for, sell, and convey unto the said company of proprietors, or to such person or persons as they shall nominate and appoint, for the use of the said navigation, all or any part of such lands or hereditaments which shall from time to time be set out and ascertained as aforesaid, &c. &c.; that all such contracts, agreements, sales, exchanges, conveyances, and assurances shall be valid and effectual in law to all intents and purposes whatsoever, any law or statute to the contrary thereof in anywise notwithstanding, &c. &c.; and that all such contracts, agreements, sales, exchanges, conveyances, and assurances (other than those which concern copyhold lands and tenements, or any purchase or exchange be-

By a canal act it was provided that it should be lawful for any person seised of or interested in any lands or hereditaments which should be set out for the purposes of the act, to contract for, sell, and convey to the company or their nominee the land so set out; that all such contracts, agreements, sales, exchanges, conveyances, and assurances should be valid and effectual in law to all intents and purposes, any law or statute to the contrary notwithstanding; and that all such contracts &c., should be inrolled by the clerks of the peace of the respective counties of Warwick and Worcester in which such lands &c. should lie: and, by a subsequent

section, that, upon payment of the sum agreed for or assessed &c., such lands &c. and the fee-simple and inheritance thereof should from thenceforth be vested in and become the sole property of the company for the purposes of the act:—Held, that the act did not dispense with a conveyance *in writing*.

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tween any such respective land-owners, so to be made as aforesaid, shall, at the expense of the said company of proprietors, be introlled by the clerks of the peace of the respective counties of Warwick and Worcester in which such lands and hereditaments shall lie; and true copies thereof, signed by such clerks of the peace respectively, shall be allowed to be good evidence in all courts whatsoever." And by the 27th section it is further enacted, "That, upon payment of such sum or sums of money or annual rent as shall be contracted or agreed for between the parties, or determined and adjusted by the commissioners, or any five or more of them, or assessed by such juries in manner respectively as aforesaid, for the purchase of or satisfaction for any messuages, lands, tenements, or hereditaments as aforesaid, to the proprietors thereof, or other persons entitled to receive such money or rent respectively, or legal tender thereof made to such proprietor or proprietors or other person or persons, or to the principal officer or officers of any such body politic, corporate, or collegiate, at any time after the same shall have been so agreed for, determined, or assessed, or if he, she, or they cannot be found, or shall refuse to accept such money or rent, upon payment thereof to such person or persons as the said commissioners, or any five or more of them, shall by writing under their hands appoint, for the use of, and to be paid upon demand, without fee or reward, to, such proprietors or persons respectively, as aforesaid; then and in such case such messuages, tenements, lands, and hereditaments respectively, and the fee-simple and inheritance thereof, shall from thenceforth be vested in and become for ever the sole property of the said company of proprietors, to and for the purposes of this act, but to or for no other use or purpose whatsoever."

The cause was tried before Gaselee, J., at the last Assizes for the county of Warwick. The lessor of the

plaintiff, it appeared, in 1824, purchased the adjoining land; and evidence was given on his behalf of various acts of ownership exercised by himself and the party from whom he purchased, which it was contended were inconsistent with the right to the soil claimed by the defendants; and the absence of any conveyance in writing to the company was also strongly relied on. The learned judge told the jury that the only question for them to consider was, which party had had possession or exercised acts of ownership over the locus in quo for the last twenty years. The jury said that they were of opinion that the soil belonged to the plaintiff, but that the culvert belonged to the defendants. A verdict was thereupon entered for the lessor of the plaintiff.

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Adams, Serjeant, in Michaelmas Term, obtained a rule nisi for a new trial, on the ground that the verdict was against the weight of evidence, and also that the learned judge had withdrawn from the consideration of the jury the question whether a legal conveyance of the land had not been made to the defendants at the time of the erection of the culvert, the existence of which, it was contended (if upon the construction of the act and contract in writing were necessary to vest the land in the company), might under the circumstances be presumed.

Goulburn, Serjeant, and *Hamfrey*, shewed cause, contending that the question had been properly left to the jury and properly decided by them, and relying upon acts of ownership proved to have been exercised by the plaintiff and the party under whom he claimed over the locus in quo.

Wilde, and *Adams*, Serjeants, and *Amos*, in support of the rule.—There was ample evidence to warrant the jury in presuming a conveyance to the defendants. As to this

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the jury received no direction; the act of parliament was withdrawn altogether from their consideration: neither did the learned judge give them any direction as to the acts of ownership.

TINDAL, C. J.—I am cautiously desirous of abstaining from any remarks that might in the most remote degree tend to prejudice the cause in the second investigation which we think it ought to undergo. It appears to me that the main point for the consideration of the jury was whether or not there had been any valid contract with the owners of the land for the purchase of the soil by the company under the act which incorporated it. Upon the construction of that act, I am of opinion that the contract for the purchase of land by the company was intended to be a contract in writing, as in any other case. But it by no means follows that it would be necessary for the defendants to produce it: such a contract might be presumed from the fact of enjoyment for a long series of years. The question, however, ought to receive the consideration of a jury. Another and a subordinate question at the trial was, whether, supposing the soil to have been originally vested in the company, the plaintiff had shown an adverse possession for twenty years. The first point was not submitted to the jury at all: the second was, substantially; but I cannot say that I am satisfied with their finding upon that point, and therefore think there ought to be a new trial, on payment of costs.

PARK, J.—I am of the same opinion. I have looked at the act, and I think it is impossible to suppose that a contract in writing was not in the contemplation of the legislature. I am not prepared to say that the instrument must necessarily be produced, or that the jury might not from other circumstances presume a legal conveyance. The question ought to have been left to them. The question

of adverse possession is one of importance, and seems to me to require further investigation.

GASELEE, J., concurred.

BOSANQUET, J.—I also think that the contract mentioned in the 27th section of the act must be such a contract as is competent to convey land by the general law. Such a contract, it is true, may be presumed under certain circumstances: but the question of presumption is one that must be left to the jury; the court cannot decide on presumption.

Rule absolute, on payment of costs.

LYSONS, Executrix of J. G. C. GARDINER, Deceased,
v. G. H. BARROW and Another.

Wednesday,
Jan. 27th.

ASSUMPSIT for 2000*l.* had and received by the defendants to the use of the plaintiff as executrix of J. G. C. Gardiner, deceased. The defendants—after craving oyer of the letters testamentary, which were set out, and by which it appeared that the will of Colonel Gardiner had been duly proved, and letters testamentary granted in the Prerogative Court of Canterbury, and also in the Prerogative Court of the Archbishop of York, the deceased “having in his lifetime and at the time of his death bona notabilia in divers dioceses or peculiar jurisdiction within the province of York”—pleaded, first, non assumpsit; secondly, that, before and at the time of the death of the said J. G. C. Gardiner, deceased, the defendants were and from thence hitherto had been and still were resident and commorant at the parish of Southwell, in the county of Nottingham; which said parish of Southwell, during all the time of the said residence and commorancy there of the defendants, was and still is within the peculiar jurisdiction

A prerogative administration of goods within a peculiar is not void at common law, though it might be avoided by sentence of the Ecclesiastical Court.

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of the chapter of the collegiate church of the Blessed Mary the Virgin of Southwell, in the county of Nottingham, and out of the jurisdiction of the archbishop of the province of York: that the said sum of 2000*l.* was received by the defendants after the death of Gardiner from certain persons carrying on the business of an insurance company under the name and style of The Law Life Assurance Society, under and by virtue of a certain policy of insurance in writing theretofore and in the lifetime of Gardiner, to wit, on the 10th September, 1831, caused by the defendants to be made; by which said policy of assurance, after reciting that the defendants, both of Southwell, in the county of Nottingham, gentlemen, the persons assured by that policy, were desirous and had proposed to effect an insurance with The Law Life Assurance Society in the sum of 2000*l.* upon the life of Gardiner, &c., (setting out the policy): that the plaintiff, by averring the said sum of 2000*l.* to have been received for her use as executrix, supposed the truth to be, and intended to say, that the defendants, before and at the death of Gardiner held the said policy for the use of Gardiner; which said supposition the defendants (but for the purposes of that plea only) admitted to be true, and averred the fact to have been so: that the said promise in the declaration mentioned was not an express promise made by the defendants, but a promise intended by the plaintiff to be implied by law from the receipt of the said sum of 2000*l.* by the defendants, and the matter so supposed to be true as aforesaid: that there was never any contract between the said society and Gardiner, or between the society and the plaintiff as executrix as aforesaid, in respect of the said policy or the said sum of 2000*l.* insured thereby; but that the said insurance company contracted solely with the defendants according to the terms of the said policy as thereinbefore stated and set forth: By reason of which several premises, the proving of the said will of Gardiner, and the granting administration of

all and singular the goods, chattels, and credits of Gardiner, in respect of the said sum of £2000, so received by the defendants, of right belonged and appertained and still did belong and appertain to the said chapter of the collegiate church aforesaid, and not to the Archbishop of York; and the letters testamentary produced in court were void and of no effect against the defendants in respect of the said sum of £2000.—*Verification.*

Issue was joined on the first plea, and to the second the plaintiff replied, that the said parish of Southwell, in the said county of Nottingham, and in that plea mentioned, during all the time of the said residence and commorancy there of the defendants, was, and from thence hitherto had been and still was, within the jurisdiction of the Archbishop of the province of York in the same plea mentioned—concluding to the country. Issue thereon.

The cause was tried before Gascoke, J., at Nottingham. In support of the second plea, the defendants gave in evidence a Bull of Pope Alexander the Third, dated the kalends of August, 1171 (17 Hen. 2), by which certain privileges were granted to the church of St. Mary of Southwell, amongst others as follows:—"Nihilominus etiam presentis scripti decreto sancimus ut Ecclesiæ prebendarum et communionis ab omni jure et consuetudine episcopali libere sint, penitus et immunes, et in iisdem Ecclesiis vobis liceat vicarios idoneos absque aliquâ contradictione instituere, sicut Eboracenses archiepiscopi et capitulum id vobis et predecessoribus vestris permisisse noscuntur, et in presentiarum in Ecclesiâ Eboracensi et vestrâ pacificè observantur."

On the part of the plaintiff, the registrar of the Prerogative Court of York was called, and stated that the Archbishop of York had granted letters testamentary in Southwell, and had inhibited all persons possessing ecclesiastical jurisdiction within the peculiar of Southwell from exercising the same pending the Archbishop's primary visita-

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tion. It was also proved that the deceased had goods at a place called Thurgarton, in the diocese of York, and out of the peculiar jurisdiction.

A verdict was returned for the plaintiff—the jury finding that the parish of Southwell was within the jurisdiction of the province of York: and leave was reserved to the defendants to move to enter a nonsuit if the court should be of opinion that the York probate was void.

Amos, in Michaelmas Term last, accordingly obtained a rule nisi.—He submitted the rule requiring a prerogative probate where the deceased possessed bona notabilia in several dioceses, did not apply to a case like the present, where the party also possessed bona notabilia within a peculiar jurisdiction. He referred to *Price v. Simpson*, Cro. Eliz. 719, where a testator dying leaving leaseholds in the diocese of York, and others in a peculiar in the same diocese, it was moved whether administration durante minore ætate of the executrix should be granted both by the ordinary of the diocese and the officer of the peculiar, or a grant be obtained in the Prerogative Court; and it was resolved that there should be two letters of administration granted, for the archbishop should not have any prerogative in the peculiar, because it was first derived out of the jurisdiction: he also referred to 1 Roll. Abr. *Executors*, 909, and to the ninety-second canon of 1603.

Wilde and *Adams*, Serjeants, *Hill*, and *Humfrey*, shewed cause.—The probate was properly granted by the Archbishop of York. Much inconvenience, expense, and failure of justice must ensue in many cases if it be held necessary to take out administration in every peculiar jurisdiction in which the testator might chance to have bona notabilia. At all events, the York probate was not void: it could only at the most be voidable by sentence of the Ecclesiastical Court—*Marriott v. Marriott*, 1 Str. 671.

The reports of the case of *Price v. Simpson* in 5 Rep. 30 *a* (where it is called *Prince's case*), and in 2 And. 132, do not exactly confirm the report in Croke; and even Croke's report only shews that in that case there should have been two administrations, not suggesting that the administration granted by the archbishop was *void*. It is laid down in Com. Dig. *Administrator* (B. 2), that, "if a man die intestate, having goods in a peculiar and also in a diocese within the same province, administration shall not be granted by the archbishop, but by the bishop for the goods in his diocese, and by the judge of the peculiar for the goods there; yet, if the metropolitan grant administration when it does not belong to him, *it is not void, but voidable only*." The case of bona notabilia in a diocese and also in a peculiar falls within the same principle as the case of bona notabilia in two several dioceses. Sir John Nicholl, in *Parham v. Templer*, 3 Phil. 213, says: "The very term 'peculiar,' ex vi termini supposes an exemption from ordinary jurisdiction. And Ayliffe, in his *Parergon Juris*, heads his chapter 'Of peculiar or exempt jurisdictions' as if these were synonymous terms. He goes on to say, 'Peculiars are called exempt jurisdictions, not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own.' And so Gibson, in his *Codex*, and Godolphin also, though they treat the subject more at large, draw the same conclusion. There are, however, different sorts of peculiars; and they have different rights belonging to them, which must be regulated either by the nature of the peculiar itself, or by antient usage. There are some more highly exempt than others: I mean royal peculiars, which were antiently exempt from the jurisdiction, not only of the diocesan, but of the archbishop also, and which were immediately subordinate to the See of Rome. By the statute of King Henry 8 (21 Hen. 8, c. 5), as already stated, these were placed immediately under the jurisdiction of the

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crown; and all appeals from them lie directly to his majesty in the High Court of Delegates. But the more common sort of peculiars are those in which the bishop has no concurrency of jurisdiction, and are exempt from his visitation. These have their appeals directly to the archbishop, and not to the diocesan within the circle of whose diocese they are locally situated. There is a third description of peculiars, which are still subject to the bishop's visitation, and, being so, are still liable to his superintendence and jurisdiction. Wood, in his Institute, mentions these. He says: 'These the bishop visits at his first and at his triennial visitation.' Here the appeal lies from the peculiar to the diocesan; but the right of appeal and the right of visitation seem almost necessarily to go together. The canons of 1603, not having been confirmed by parliament, do not bind the laity—*Middleton v. Crofts*, 2 Atk. 652, 659. (The passage cited from Rolle's Abridgement is not borne out by the authority Rolle cites for it—*Nathan's case*, 8 Rep. 269, where it was resolved—'Forasmuch as the defendant had not shewed in his bar that the intestate had bona notabilia in certain; for this cause it shall be taken that the administration was granted where the intestate had not bona notabilia in several dioceses; yet it was agreed that such administration was not void, but avoidable, as it was adjudged in *Hugh Vere's case*.')

Spankie, Serjeant, and *Amos*, in support of the rule.—That administration in this case should have been taken out in the peculiar, is clear from the case of *Price v. Simpson*, Com. Dig. *Administrator* (B. 2), and Vin. Abr. *Executor* (F). Gibson, in his Codex, affirms the correctness of Coke's report of *Price v. Simpson*. He says (1 Godb. 565): 'Where one dies possessed of goods in the diocese of an archbishop and in a peculiar of the same diocese, as it was in the case of *Price v. Simpson*; here also the court declared that there were to be two several administrations;

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and that the archbishop could have no prerogative, because the peculiar was first derived out of his jurisdiction." So, in *Teller on Executors*, p. 52, it is said: "If the probate be granted by a bishop or inferior judge, when it does not belong to him, it is void; but, if it be granted by the metropolitan when it does not belong to him, it is only voidable, and is of force till reversed by sentence, for he hath jurisdiction over all the dioceses within his province." The administration granted by the archbishop, being granted by one having no jurisdiction, is altogether void, and not merely voidable. The case of a peculiar differs from that of an ordinary diocese in this, that it is so far exempted from the archbishop's jurisdiction, that no appeal lies to him—*Jones v. Jones*, Hob. 185. In *Smithwick v. Bingham*, Moore, 693, it is said: "Aut exception fuit prise que le pl' lay entitle al u. tenn p' ans p' un administration priat del archevesq' de Canterbury, et n'allege que l'intestate ad biens en divers diocesses: et uoc' aux bone, quia n'appiert ala justices s'il avoit ou nemyt mais s'il use appear al eur ils pristerant cleare que l'administration p' l'archevesq' ust estre void si l'intestate n'avoit biens en divers diocesses." The inhibition only enjoins the peculiar to forbear to do any thing in prejudice of the archbishop's visitation: and, although it is usual to forbear to grant administrations pending an inhibition, it by no means follows that the authority of the peculiar is suspended.

TINDAL, C. J.—The question for our consideration in this case is, whether, upon the pleadings or the evidence, it appears that the letters testamentary on which depends the plaintiff's right to maintain the action are void or merely voidable: for, if they are void, a court of law must take notice of the defect of the plaintiff's title, and hold that one who comes clothed with such defective title cannot recover: on the other hand, if the letters testamentary are merely voidable, and not an absolute nullity, the plain-

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tiff's title to sue in a court of law is perfect, until the authority upon which his title is founded is abrogated by sentence of the Ecclesiastical Court. The administration in question was granted in the Prerogative Court of the Archbishop of York; and it is contended, on the part of the defendants, that, inasmuch as Colonel Gardiner had bona notabilia within the peculiar of Southwell, as well as within the diocese of York, there should also have been an administration taken out in Southwell; and *Price v. Simpson* is relied on in support of this position. That case, as reported in 5 Rep. 30 *a*, decides that an administrator durante minore ætate could not sell a term of the deceased. In the report of the same case in Anderson, is the following passage: "Que infant fuit fait executor; et entre autres leses devise a luy; et administration durante minore ætate dell infant est commit a un que vende et alien les leses. Et fuit agre per les justices que le administrator ne poit vende les leses sinon que fuit sur cause reasonable movant." The only report of that case in which allusion is made to the effect of a prerogative administration where there are bona notabilia in a peculiar as well as in a diocese, is that in Cro. Eliz. From that report it appears that one Jackson being lessee for years by several leases of divers lands, some of them in the diocese of York, some in a peculiar within the same diocese, devised all these leases to his son, and made his daughter within age his executrix. The mother took administration durante minore ætate of the executrix in the peculiar, where the testator died, ad commodum et proficuum executricis. The administratrix granted the term, durante minore ætate of the executrix, to the plaintiff. The question to be decided was, whether this grant was good or not; and the first resolution disposes of the case; for, the court say that it was not good, for such an administration hath but a special property ad proficuum executoris, but not a general property, as another executor or administrator hath; and therefore his sale of goods, unless they be bona peritura,

or it be for necessity, for the payment of debts which he is chargeable to pay, shall not bind; but he may sue and be sued; and his authority is but a limited authority; and therefore, like as if letters ad colligendum bona defuncti were granted to one, there he may sell bona peritura; as, fruit, or the like. The court then proceed to the determination of other points; but it is frequently observed that dicta upon questions not in issue in the cause are not entitled to the same respect as decisions upon the precise point in controversy. The second resolution is, "that an executor at the age of eighteen years may assent." The third is, "that there should be two letters of administration granted; for, the archbishop shall not have any prerogative here, because this peculiar was first derived out of his jurisdiction." In the report of the case in 5 Rep. 30 *a*, Lord Coke says three points were ruled—the first, "that an administrator durante minore ætate cannot sell any of the goods of the deceased, unless it be of necessity, for payment of debts, or bona peritura"—secondly: "Such administration doth cease at the infant's age of seventeen"—thirdly: "And in this case *it was said* that judgment was given in the King's Bench, Paschæ 22 Eliz., between *Vere* and *Jefferies*, that, where one hath goods only in an inferior diocese, yet the metropolitan of the same province pretending that he had bona notabilia in divers dioceses, committed administration, this administration is not void, but voidable by sentence; because the metropolitan hath jurisdiction over all the dioceses in his province; and therefore it cannot be void, but voidable by sentence: but, if an ordinary of a diocese commits administration of goods when the party hath bona notabilia in sundry dioceses, such administration is merely void, as well as to the goods within his own diocese as elsewhere, because he can by no means have jurisdiction of the cause." This third resolution, therefore, is no more than what is prescribed by the common law, viz. that, where there are

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any effects within the province, a prerogative administration is valid until declared otherwise by sentence; but that an administration granted by a diocesan, where the intestate has goods in two separate dioceses, is void *ipso facto*. The like position is laid down in *Com. Dig. Administrator* (B. 2). The utmost effect, therefore, of *Price v. Simpson* is, that cases may occur in which the archbishop ought not to grant administration; leaving still open the question whether the prerogative administration in such cases would be void or voidable only. If the authority of the archbishop be merely doubtful, we must see what the practice has been. The evidence in this case shewed that inhibitions have been issued by the Archbishop of York to the peculiar of Southwell. Some jurisdiction must have been exercised over it by the archbishop. Upon the whole, inasmuch as it is not made out to my satisfaction that the present administration is void, I am of opinion that this rule should be discharged.

PARK, J.—The question is whether this administration is void or voidable only. *Price v. Simpson*, as reported in *Cro. Eliz.*, is the only authority that has been adduced to shew the administration void. In the reports of that case by Sir Edward Coke and by Anderson, the point does not appear to have been decided; and this is somewhat singular; for, Coke refers to a case of *Vere v. Jefferies*, which was decided about twenty years before, and in which a distinction is taken between an administration granted by an archbishop in any part of his own province, and an administration granted by a bishop out of his own diocese: upon which Sir Edward Coke observes, “that, where one hath goods only in an inferior diocese, yet the metropolitan of the same province pretending that he had bona notabilia in divers dioceses, committed administration, this administration is not void, but voidable by sentence, because the metropolitan hath

jurisdiction over all the dioceses in his province; and therefore it cannot be void, but voidable by sentence; but, if an ordinary of a diocese commits administration of goods, when the party hath bona notabilia in sundry dioceses, such administration is merely void, as well as to goods within his own diocese as elsewhere; because he can by no means have jurisdiction over the cause." *Nedham's case*, 8 Rep. 268, is to the same effect. Opposed to these authorities the dictum in *Cro. Eliz.* stands alone. The judgment of Sir John Nicholl, in *Parham v. Temp-ler*, is also in favour of the validity, at least till sentence, of the administration now under consideration. The fact of inhibitions having been issued into Southwell by the Archbishop of York is also strong to shew that the proper jurisdiction has been exercised in this case.

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GASLER, J., concurred.

BOSANQUET, J.—The question is whether the prerogative administration granted in this case is void or not. *Price v. Simpson*, in *Cro. Eliz.* 719, giving the fullest effect to it, only amounts to this, that two administrations should have been granted, not that the prerogative administration is void. And even that is an extrajudicial dictum that is not to be found in either of the other reports of the same case. So, the dictum in *Smithwick v. Bingham*, que "s'il n'est appaer al eür (the court) ils pristerant cleare que l'administration p' l'archevêsq' n'est estre void si l'Intestate n'avoit biens en divers diocesses," was not necessary to the determination of the principal question before the court; and it would appear to conflict with *Vere v. Jeffries*. It is unnecessary here to consider the precise degree of resemblance between the case of a peculiar and that of a bishop within his own diocese; it is enough to say that no authority has been adduced to shew that the prerogative

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tive administration granted in this case is void. The rule must therefore be discharged.

Rule discharged.

Wednesday,
Jan. 27th.

DOE d. MILBURN v. EDGAR.

One G. was let into possession of land allotted to one P. under an inclosure act in 1814 upon a contract of sale under which one half of the purchase money was paid, and interest upon the remaining moiety regularly till the year 1823, when G. became bankrupt. No conveyance was ever executed, nor was the remainder of the purchase money ever paid:—

Held, that the possession by G. under this inchoate contract was not adverse to the title of P., the vendor; and that the assignee of P. might maintain ejectment notwithstanding

the lapse of twenty years from the time possession was first given:—Held also, that it was not competent to G., or to one claiming under him, to contest the title of P. by reason of the want of an award by the commissioners under the act.

THIS was an action of ejectment for the recovery of land in the parish of Uphill, in the county of Somerset. In addition to the facts stated in a former report of this case, ante, p. 581, it appeared at the trial that the lessor of the plaintiff, treating the purchase from Payne by Gegg as incomplete, had demanded possession of the premises in question, which the defendant refused to deliver up. On the part of the defendant it was contended that an adverse possession for more than twenty years having been shewn on the part of Gegg, a legal conveyance of the land to him must now be presumed (a); and also that there was no evidence of any award made by the commissioners under the inclosure act, upon which to found a title in Payne. Coleridge, J., told the jury that the possession of Gegg was not adverse, and left it to them to say whether or not the sale to him had ever been completed. The jury found that it had not, and a verdict was thereupon entered for the lessor of the plaintiff.

Erle, in Michaelmas Term last, obtained a rule nisi for a nonsuit or a new trial, on the grounds above stated—

(a) Objections were also taken to the validity of the assignment by Payne under the lords' act to the lessor of the plaintiff: these were disposed of on the former

occasion; and the reference as to the other points not having been proceeded with, they were now argued.

Crowder and Ball shewed cause.—The case stands in the same position as if Payne had been the lessor of the plaintiff, and Gegg the defendant. As between them, it is perfectly clear there has been no adverse possession. Gegg was in under an agreement for a sale which was never completed; he was therefore a mere tenant at will, whose possession was liable at any time to be determined by a demand—*Right d. Lewis v. Beard*, 13 East, 210; *Doe d. Newby v. Jackson*, 2 D. & R. 514, 1 B. & C. 448; *Doe d. Hiatt v. Miller*, 5 C. & P. 595. In *Hall v. Doe d. Surtees*, 1 D. & R. 340, 5 B. & A. 687, where A. mortgaged premises in fee to B., with a proviso for redemption on payment of the mortgage money on a given day, but A. continued in possession until his death, after which C., his son and heir, and his widow, continued in possession until the death of the latter, when C. conveyed the premises in fee to D., who levied a fine with proclamations, and entered into possession: on ejectment being brought by E., the heir at law of B., the original mortgagee, and a special verdict found as a fact the nonpayment of the mortgage debt on the given day, without finding either an adverse possession by A. or his heir, or that interest had been paid upon the mortgage money by the mortgagor: it was held, that, though there had been a lapse of thirty-seven years since default in payment of the principal, the statute of limitations was no bar to the ejectment, and consequently that the mortgagee was not precluded thereby. With respect to the objection as to the want of an award—when possession was given of the land in question by the commissioners, it was given in fact to Payne, the party to whom the allotments had been made.

Erle and Barstow, in support of the rule.—A party who comes in under an agreement for a purchase, is not tenant to the vendor—Sugd. V. and P., 7th edit., 231.

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Here, Gegg was let into possession as a vendee, and at all events after a lapse of twenty years his title became adverse to that of the vendor. In *Right d. Lewis v. Beard* and *Doe d. Newby v. Jackson* there had not been twenty years' adverse possession. This is like the case of a feoffment without livery of seisin: a party let into possession under a feoffment without livery remaining in possession twenty years, such possession becomes adverse so as to preclude the feoffor from maintaining an ejectment. Payne had no title in respect of which his assignee can maintain ejectment. Where property is claimed under an inclosure act, the party is bound to shew an award duly made by the commissioners: here, no such evidence was given. By the general inclosure act, 41 Geo. 3, c. 109, the legal title to an allotment is not acquired until the execution and proclamation of the commissioners' award; and where a local act directed that the commissioners, by notice, might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors, and that the owners might fence their allotments after they had been marked, staked out, and confirmed, and *before the signing the award*, and might also, within three months *before the execution of the award*, sell and convey their interests in the allotments, the commissioners being thereby authorized to allot to the purchasers, and the latter, *after the execution of the award*, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that, where the allotments were copyhold, the deed should be inrolled in the court-rolls of the manor, and that the purchaser should be admitted tenant thereto at the same time as the other allottees of the copyhold lands, viz. *after the execution of the award*: it was held (*Farrer v. Billing* 2 B. & A. 171), that this authority to inclose and so to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given) be enjoyed and exercised without

the legal seisin of the land; and that, therefore, these provisions not sufficiently countervailing those of the general inclosure act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award. In *Ellis v. Arnison*, 5 B. & A. 47, 2 D. & R. 161, where an inclosure act directed that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed to the impropriate rectors and curate in lieu of all great and vicarial tithes; and the commissioners were then required to distinguish by their award the several allotments to such rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes: it was held that the tithes were not extinguished until the commissioners had made their award. *Carr v. Baldwin*, 1 Stark. 65, is an authority to the same effect. And even if Payne acquired a legal title under the local act in the absence of an award, Gegg being put into possession as vendee, under the 23rd section, had the same rights as the vendor, Payne; and therefore cannot at this distance of time be turned out of possession.

TINDAL, C. J.—I am of opinion that no sufficient ground has been shewn either for entering a nonsuit or for granting a new trial in this case. Two grounds have been urged for the motion—first, as to the rule of law as applicable to the land, supposing it to have been freehold—secondly, as to the peculiar character of the property as an allotment under an inclosure act. The questions may be considered, as was observed in argument, as if the parties to this record had been Payne and Gegg, the lessor of the plaintiff claiming under the former, and the defendant under the latter. On the part of the defendant it is contended that the lessor of the plaintiff cannot recover, because there has been an adverse possession by Gegg for more than twenty years. Let us see

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how the fact of adverse possession is made out. Gegg, it appears, was let into possession of the allotments in July, 1814, under a written authority addressed to the commissioners by Payne, stating that the allotments had been sold to Gegg. Half the purchase money was paid in two sums of 200*l.* each, and interest on the remaining 400*l.* was paid by Gegg to Payne down to the time of the bankruptcy of the former in 1828. Upon this evidence, what other inference could the jury draw than they did, viz. that Gegg was let into possession under a contract for a purchase which was never completed? The possession clearly was not adverse: and it has not been contended that Gegg might not within twenty years have been turned out of possession by Payne. The case has been assimilated to that of a feoffment without livery of seisin; and it has been said that one who is let into possession by a feoffment without livery of seisin, and remains in possession for twenty years, thereby acquires a title by adverse possession. The 70th section of Littleton, with Lord Coke's commentary thereon, is an authority the other way. Littleton says: "If a man make a deed of feoffment to another of certain lands, and delivereth to him the deed, but not livery of seisin; in this case, he to whom the deed is made may enter into the land and hold and occupy it at the will of him who made the deed, because it is proved by the words of the deed that it is his will that the other should have the land; but he who made the deed may put him out when it pleaseth him." And Coke adds: "It appeareth, that, if the feoffee doth enter, he is tenant at will, because he entereth by the consent of the feoffor." Here, Gegg was let into possession by consent of the owner of the land, and the fact of the payment of interest from that time until 1828, shews that he retained possession only with the permission of Payne.—With regard to the second point—The authority given by Payne to the commissioners was as follows: "I direct you to put John

Henry Gegg in possession of the two allotments made in respect of the premises belonging to me." This shews that the allotment had already been made. By the 23rd section of the inclosure act it is provided that a party who has agreed to purchase any allotment, shall, if let into possession, have the same rights as the vendor: and it is contended, that, Gegg having been let into possession, and no award having been proved to have been made by the commissioners, Payne had no legal title. The first answer to that argument is, that, if well founded, it would have been equally applicable immediately after the transaction took place: and I apprehend it will scarcely be contended that it would not have been competent to Payne at the end of a fortnight to have ejected Gegg. Besides, if Gegg was let into possession under Payne, he cannot be permitted to dispute Payne's title: he must stand or fall by the title of the party under whom he obtained possession. The intention of the 23rd section of the act was not to raise questions between vendor and vendee, but to clothe the latter, as against third parties, with the same rights as the former could himself have enjoyed. I am clearly of opinion that there was no such adverse possession as between Payne and Gegg, as to warrant the jury in presuming a conveyance, and that the verdict ought not to be disturbed.

PARK, J., and GASELEE, J., concurred.

BOSANQUET, J.—I think also that this rule must be discharged. The jury have found that Gegg's possession was not adverse, and their verdict appears to me to be well warranted by the evidence. The facts are these: Gegg in 1814 agreed with Payne to purchase the allotments in question; half the purchase money was paid, and Payne received interest on the residue down to Gegg's bankruptcy in 1828. No conveyance was ever in fact exe-

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cuted. Gegg being let into possession under this agreement, until a demand and refusal to re-deliver it, he would not be a trespasser. With respect to the inclosure act, I am clearly of opinion that it is not competent to the defendant, nor would it have been to Gegg, to dispute Payne's title. Gegg's interest in the premises was merely permissive.

Rule discharged.

Thursday,
Jan. 28th.

CHAPMAN v. GATCOMBE.

One W. G., being seised in fee of lands, purchased the tithes thereof, and, by a settlement made on the marriage of his son, conveyed to trustees for the use of the son for life, remainder to the son's wife, in bar of dower, the lands, "together with all houses, out-houses, &c., profits, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever, to the said premises belonging or in any wise appertaining; and the reversion, &c., and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim, and demand whatsoever, either at law or in equity, of him, W. G., therein or thereto, or to any part or parcel thereof:"—Held, that, under this conveyance, the tithes did not pass.

THIS was an action of assumpsit to recover the value of tithes of lands in the occupation of the defendant. At the trial before Coleridge, J., at the last Assizes for the county of Somerset, it appeared that the plaintiff claimed the tithes in question in right of his wife, the heir of W. Gatcombe, a former proprietor, who in 1815, being then the owner of the land, purchased the tithes from the lay impropriator, and by a settlement made upon the marriage of his son Joseph with the defendant, in April, 1816, conveyed Gatcombe House, forty acres of land called Shovel lands, and fifty-eight acres of land called Daws and Larhams, in the parish of North Petherton, and in the occupation of Joseph Gatcombe—"together with all houses, out-houses, edifices, buildings, ways, paths, passages, waters, watercourses, easements, profits, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said premises belonging or in any wise appertaining; and the reversion &c., and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim, and demand whatsoever, either at law or in equity, of him W. Gatcombe therein or thereto, or to any part or parcel thereof"—to

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trustees to the use of Joseph Gatcombe for life, remainder to the use of the defendant, in bar of dower. W. Gatcombe died in 1817; Joseph Gatcombe, the son, received the tithes in question, as heir of W. Gatcombe, until 1820, when he died, leaving his widow, the defendant, surviving him. On the death of Joseph Gatcombe, the plaintiff's wife became his heir at law. The tithes were proved to have been regularly paid, under a composition, to the plaintiff and his wife from the year 1820 to 1832, when the defendant refused to pay the composition any longer, contending that the tithes passed to her trustees by the deed of 1816. It was also proved on the part of the defendant that negotiations had for some time been pending between the owners of land in the parish of North Petherton and the Marquis of Downshire, the former owner of the tithes of the parish, for their redemption; and that W. Gatcombe became possessed of the tithes in question, and of those tithes alone, under this arrangement. The conveyance from the Marquis was put in.

A verdict having been taken for the plaintiff, with leave to the defendant to move to enter a nonsuit if the court should be of opinion that the tithes did pass by the deed of 1816—

Erle, in Michaelmas Term last, obtained a rule nisi accordingly.

Crowder and *Kinglake* shewed cause.—The tithes did not pass by the deed of 1816; the words of that deed apply only to land and to such things as are appurtenant to the land. Tithes are not appurtenant to the land, but something altogether collateral and distinct—*Shep. Touch.* 78; *Priddle* and *Napper's* case, 11 Rep. 13 a. Lord Coke there says: "Decima pars, which we call tithes, is an ecclesiastical inheritance, collateral to the estate of the land, and, of their proper nature, due only to an ecclesias-

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tical person by the ecclesiastical law, and therefore no unity of possession can either extinguish or suspend them; but they, notwithstanding any unity, remain in ease, so that they may be demised or granted to any spiritual man, notwithstanding any such suspension. Tithes are more collateral to land than a warren, which the owner of the land has in it; for, by feoffment of the land, without excepting the warren, the warren is extinct, as it is held in 35 H. 6, 56. a. But, if a prior who has a parsonage impropriate, enfeoffs another of that part of the glebe, yet he shall have tithes against his own feoffment, as it is held in 42 Ed. 3, 13. a. And they are not like a leet; and yet, if the lord of a leet purchases land within it, his leet is not suspended, nor (if he makes a feoffment of the said land, is his leet in it extinct; as it is held in 7 Ed. 2, tit. *Avowry*, 211, and 8 Ed. 2, *Ibid.* 212; but he has an inheritance by the common law in the leet, which is descendible, and which he may grant over to whom he pleases: but such inheritance a layman cannot have in tithes by the common law, neither shall they pass by such words as temporal inheritances shall pass: and therefore, Mich. 31 & 32 Eliz., in a prohibition between John Parkens and Thomas Hinde, parson of Babington, in the county of Somerset, the case was that the said parson, by deed indented, leased his glebe, cum *proficuis et commoditatib' eidem spectantib'*, for ninety-five years, rendering rent *pro omnibus exactionib' et demandis quibuscunque dictæ rectoriæ pro clauso prædicto spectantib'*; and the question was, if the lessee should have the said close discharged of tithes during the term; and it was resolved *per totam curiam*, that the tithes should not pass by such general words; and, as they are tithes not severed, they are merely ecclesiastical, for the subtraction of which no remedy lies by the common law." This case shews clearly that tithes are collateral to the land, and do not belong to or form any portion of it. In *Parkins v. Hinde*, 1 Ea. & Y. 98, Cro. El. 161, the case above cited by Coke,

Wray, J., says: "Tithes are not things issuing out of the land, but collateral and due jure divino; and therefore cannot be discharged but by special words." In *Bone v. The Bishop of Norwich*, 1 Ea. & Y, 331, it was held that tithes cannot pass as appurtenances to a grange, for they are of several natures. In *Carey's case*, 1 Ea. & Y. 89, 1 Leon, 281, Moo. 222, where one granted *situm rectoriæ cum decimis eidem pertinentibus, habendum situm prædictum cum suis pertinentiis*; it was held by Manwood, C. B., that tithes are parcel of the rectory, and therefore for the nearness betwixt them, viz. the tithes and the rectory, the tithes passed together with the site of the rectory. In *Phillips v. Jones*, 3 B. & P. 362, where one of the deeds to lead the uses of a fine (viz. the lease) contained the word "tithes," but the other deed (viz. the release) omitted that word, the court refused to amend the writ of entry, by inserting the word "tithes," though the release had the words "and also all houses, ways, &c., hereditaments and appurtenances whatsoever to the said messuages, lands, &c., belonging or in any way appertaining." And in *The Attorney-General v. Lord Eardley*, 8 Price, 31, 1 Daniel, 271, it was held that the words "tithes and hereditaments" occurring amongst words of general description in a grant, after a particular description of the thing intended to be passed, will not pass tithes in gross. [*Tindal*, C. J.—The Lord Chief Baron, in that case, would seem to have expected to find the tithes or tenth parts mentioned amongst the premises.] In the present deed, there is a particular specification of the property intended to be conveyed: and it is well established that general words do not extend to anything of a nature different from those specifically enumerated. The case of *Lord Norbury v. Meade*, 3 Bligh, 261 (a), which was cited and much relied on by the defen-

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(a) See *Meade v. Norbury*, 3 Ea. & Y. 746: and see *Andrews v. Drever*, 1 Ad. & E. 449, and the same case on error in the House of Lords, ante, p. 1, 2 Bingham's New Cases, 1.

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dant at the trial, merely decided that a grant of the tithes of land may under certain circumstances be presumed.

Erle, in support of his rule.—The question is what was it that the grantor intended to pass by the deed of 1816. The earlier cases that have been cited to shew that tithes were considered as property held *jure divino*, and therefore not subject to the same rules of construction as property of a merely temporal nature, can have no application where the question arises between two parties claiming under the same grantor. That W. Gatcombe intended by the deed to convey the tithes as well as the land, is clear from the fact of its having been the intention of all the owners of land within the parish to redeem their tithes, and also from the fact of his being the owner of the tithes only of this particular land. It is not contended that tithes will pass under the word "hereditaments" alone; but that the words which follow shew plainly the intention of the grantor that his son should enjoy the land in as ample and beneficial a manner as he himself had done: he was to hold the land "together with all houses, &c., profits, commodities advantages, emoluments, hereditaments, and appurtenances whatsoever to the said premises belonging or in any wise appertaining; and the reversion &c., and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim, and demand whatsoever, either at law or in equity, of him W. Gatcombe therein or thereto, or to any part or parcel thereof." The grantor at the time of the grant had the claim to the tithe, and the advantage of holding the land free from tithes. Suppose, before the execution of the settlement, W. Gatcombe had parted with the fee simple of the land, could it be contended that the words of the deed would not have sufficed to pass the tithes? The words are clearly wide enough to convey the tithes if the court are of opinion

that the grantor so intended. In *Dowse*, Dem., *Lloyd*, Ten., *Reeve*, Vouchee, 2 B. & P. 578, the writ of entry and subsequent proceedings in a recovery were allowed to be amended by inserting the words "all and all manner of tithes whatsoever yearly arising &c. from and out of the said premises," upon an affidavit setting out the vouchee's title to the tithes, and stating his intention to have passed all his interest in the premises; the word "hereditaments" being contained in the deed to lead the uses. Land strictly cannot pass as appurtenant to land; and yet, in *Ongley v. Chambers*, 8 Moo. 665, 1 Bing. 483, where a testator devised the rectory or parsonage of M., with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises *thereunto belonging*: it was held that certain lands which had been acquired by the owners of the rectory between the years 1607 and 1632, and had been uniformly occupied with it since, and were described in the several successive leases of the property, passed under such devise. Lord Gifford, in delivering the judgment of the court, there says: "It has been agreed by the counsel on both sides, that the words *thereunto belonging* are not to be construed in the strict sense of appurtenant, as used in conveyances, but that such words might receive a much larger construction in the case of a devise: and, undoubtedly, a variety of cases decided on wills shew most clearly that such a construction might be applied to words more technical than those of *thereunto belonging*. It has also been agreed, that, although land might not be appurtenant to land, yet that, strictly speaking, it might belong to a messuage or rectory; and that, even under the word "appertaining," land might pass in a will, as belonging to a messuage, although in strictness of law not appurtenant thereto. The case of *Hill v. Grange*, 1 Plowd. 170, was cited in the course of the argument, and, as it was decided on the construction of a deed, it was far stronger than the present. There, the defendant, in bar

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to an action of trespass quare clausum fregit, justified by stating that a lease was made to him of a messuage and of all the lands appertaining to the same messuage, to hold to the defendant for twenty years, at the yearly rent of 40s.; and the judges unanimously agreed that the averment that the land had been always appurtenant to the messuage, was bad in point of law, and that land might be appurtenant to a messuage in the true and proper definition of an appurtenance. But all of them, except Brown, J., (who did not speak to this point) agreed that the word *appertaining* to the messuage should be there taken in the sense of *usually occupied with* the messuage, or *lying to* the messuage; for that, when *appertaining* is placed with the said other words, it cannot have its proper signification; and therefore it shall have such signification as was intended between the parties, or else it shall be void, which it must not be by any means, for it is commonly used in the sense of *occupied with*, or *lying to*, ut supra: and, being placed with the said other words, it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law; and, forasmuch as it is commonly used in that sense, it is the office of judges to take and expound the words which common people use to express their meaning, according to their meaning; and therefore it shall be here taken not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended it.' Now, that was the construction of a common law conveyance, as applied to a lease, and yet it was determined that the word *appertaining* might be taken in its ordinary acceptation as occupied with the messuage. In the case of *Hill v. Grange*, as reported in Dyer (130, pl. 70), Stamford, J., thought that land might be appurtenant to a messuage, but not parcel thereof. But, though the three other judges disagreed with him, yet they all thought that the

land passed under the words 'cum omnibus terris eidem messuagio pertinent,' as well by the intendment of the parties as by the open knowledge of the use and occupation of the land and messuage together. The same proposition is laid down in *Palmer*, 375, where it is said that a joint occupation for five or six years was sufficient to make the lands appertain by construction (that is to say), to be appurtenant, to the messuage. In *Higham v. Baker*, Anderson, J., is reported to have said (Cro. El. 16), 'that lands shall pass as pertaining to a house which hath been occupied with it by the space of ten or twelve years; for, by that time it hath gained the name of parcel or belonging, and shall pass with the house by that name in a will or leases,' &c." In *Doe d. Morgan v. Church*, 3 Camp. 71, where a house, lands, and tithes were held under a parol demise at a joint rent, a notice to quit "the house, lands, and premises, *with the appurtenances*," was held to include the tithes, and to be sufficient to put an end to the tenancy. The judgment of Lord Redesdale in *Norbury v. Meade*, 3 Bligh, 261, is a powerful authority in favour of the construction sought to be put upon this deed on the part of the defendant.

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TINDAL, C. J.—I am of opinion that the rule which has been obtained for entering a nonsuit in this case, must be discharged. The question is, whether or not certain tithes passed by the conveyance of 1816 from W. Gatcombe, the then owner, to his son Joseph, the husband of the present defendant; for, if they did, this action, which is brought by the heir at law of W. Gatcombe for a composition alleged to be due in respect of those tithes, cannot be maintained. Looking at the deed, and at the authorities that have been passed in review before us, I am of opinion that the tithes did not pass by the deed of 1816. The definition given of tithes by Sir E. Coke in *Priddle* and *Napper's* case, 11 Rep. 13, is as follows: "Decima

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pars, which we call tithes, is an ecclesiastical inheritance collateral to the estate of the land, and, of their proper nature, due only to an ecclesiastical person by the ecclesiastical law:" and although from other parts of that report it seems to have been considered that they are an incorporeal hereditament, and as such may, where the intention is clear, pass under the word *hereditaments*; yet, the deed now under consideration appears to me to contain no words calculated to evince an intention that they should pass under the word *hereditaments*. The conveyance is of a house and lands, followed by the general words that are to be found in all conveyances—"together with all houses, outhouses, edifices, buildings, ways, paths, passages, waters, watercourses, easements, profits, commodities, advantages, emoluments, *hereditaments*, and *appurtenances* whatsoever to the said premises belonging or in any wise appertaining"—the words "to the said premises belonging &c.," overriding "*hereditaments*," as well as all the other general words. The question is whether, consistently with the decided cases, we can hold the word *hereditaments*, which here means no more than *appurtenances*, to convey the tithes; for, as to the words which follow—"and the reversion &c., and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim, and demand whatsoever, either at law or in equity, of him, the said W. Gatcombe therein or thereto, or to any part or parcel thereof"—and that have been so much relied upon, it seems to me that they carry the meaning no further, relating merely to property of the like description with that which is the subject of the conveyance. Let us see what was the situation of the parties. It appears, that, in 1815, the grantor purchased the inheritance of the tithes in question. At the time of the execution of the deed, in 1816, therefore, he was the owner of the inheritance of the land and of the inheritance of the tithes. That such unity

of possession does not operate an extinguishment of the tithe, is clear from an anonymous case in Moore, 50: so separate and distinct in its nature is the tithe from the land, that, in that case, where a manor and parsonage which had belonged to an abbot came into the hands of the crown, and the crown granted the parsonage to one and twenty acres of the manor to another, it was held that this unity of possession in the crown did not extinguish the tithes. If these tithes were not extinguished, they can only be held to have passed provided the words of the grant are sufficient for that purpose. *Parkins v. Hynde*, Cro. Eliz. 161, is a distinct authority to shew that tithes must be conveyed by a specific description. There, the parson of Babington leased all his glebe land to Mills for ninety-nine years, rendering 13s. 4d. rent for *all exactions and demands*. The successor sued for tithes. Wray, J., says: "The parson shall have tithes against his lessee, and the words here shall be no discharge; for, these tithes are not things issuing out of the land, but collateral, and due jure divino; and therefore cannot be discharged but by special words. But, if the words had been, as well for tithes growing and arising upon the lands, as for other demands, then peradventure it had been a good discharge; but, as the case is, it cannot be intended by any words that he reserved the rent for tithes." In *Carey's* case, 1 Leon. 281, where a man granted *situm rectoriæ cum decimis eidem pertinent., habend. situm prædict. cum suis pertinentiis* for twenty years, and the first grantee died within the term—the tithes not having been expressly named in the habendum, the question was whether the grantee should have them for life only: the court said: "The tithes are parcel of the rectory, and therefore, for the nearness between them, the rectory and the tithes, the tithes upon the matter pass together with the site of the rectory for the term of twenty years." But, in a subsequent case, *Grubbam v. Grate*, 1 Roll. Rep. 150, Palm.

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94, 1 Ea. & Y. 313, it was held that tithes did not pass by a grant of totam illam capellam de Asherton fundatam in ecclesiâ de Barwicke, cum pertinentiis, &c. That case shews how very close and nice the distinction has been held between what words will and what will not pass property of this description. Then comes the case of *Bone v. The Bishop of Norwich*, Winch, 72, 1 Ea. & Y. 331, where it was held that tithes cannot pass as appurtenances to a grange, for they are of several natures; except, as Winch said, that the grange be the glebe, for, if it be, then the rectory may pass by that name. That case governs the present; for, the words of this deed do not extend beyond *appurtenants*, and tithes clearly cannot pass by such a description. Upon reading Lord Redesdale's judgment in *Norbury v. Meade*, I do not take it to be an authority that, upon the construction of the conveyance then under consideration, the tithes passed: he seems to leave it open whether there might not be a presumption of some other deed which did pass them; for, I observe he says: "It appeared from the evidence that both the rectory and the lands came to Sir John Packington, and that Sir John Packington, having the rectory, granted the lands. When he conveyed the lands, could he not convey them as he held them? Is it probable that he conveyed them subject to tithes, holding them himself not subject to tithes, though he might, if he thought fit, have made a separate demise of the tithes and of the land. That circumstance alone seems to afford ground of presumption, and a very strong ground of presumption, especially coupled with this, that there is no evidence of the persons who afterwards derived title from Sir John Packington to the rectory impropriate having ever received or ever claimed tithes of these lands." The cases are too strong to allow us to arrive at any other conclusion than that the tithes in this case did not pass by the conveyance in question. The rule for setting aside the verdict and entering a nonsuit must therefore be discharged.

PARK, J.—I am of the same opinion. All the authorities (with the single exception of Lord Redesdale's opinion in *Norbury v. Meade*) are uniform to shew that the tithes in question did not pass under the conveyance of 1816. "Hereditaments," occurring in the description of the property conveyed, might, under certain circumstances, pass tithes; but clearly not where the word occurs in the place it occurs in here.

GASELEE, J.—The cases are all one way, except *Norbury v. Meade*, which looks a little adverse.

BOSANQUET, J.—I am of the same opinion. The question is whether the tithes passed under the deed of 1816. *Norbury v. Meade*, which has been much relied on on the part of the defendant, proceeded on the presumption of a grant. There, the land and tithes had originally been in the crown, and had been granted by the crown to Sir John Packington, and he conveyed to the party under whom the defendant claimed by a deed containing nothing to shew that tithes were intended to pass under it; but there was evidence to shew long enjoyment of the tithes by the defendant, and those under whom he claimed. Under these circumstances, there was reasonable ground, not for presuming that Sir John Packington intended by that deed to convey the tithes, which would be giving an effect to the deed larger than the words of it warranted, but for presuming the existence of some other deed under which they passed. That is the interpretation I put upon the words of Lord Redesdale. Beyond question, the inheritance of the tithes is distinct from the inheritance of the land. Where the word "hereditaments" occurred in a deed to lead or to declare the uses, accompanied by words of local description of land out of which the tithes arose, it was the practice of this court (on motions concerning fines and recoveries) to hold tithes to pass under "heredit-

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aments.²² But, here, the meaning of the word is narrowed by those that follow—to the said premises belonging or appertaining. The tithes did not belong or appertain to the land. The other general words which follow carry the matter no further. Upon the whole I am of opinion that the court would not be justified in holding that the tithes in question passed by this deed.

Rule discharged.

Thursday,
Jan. 28th.

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Testator by his will charged an annuity upon certain leasehold premises, with a declaration, that, in case the leasehold specified should prove insufficient to discharge the annuity, the deficiency should be made up out of the rents and profits of his freehold premises. The annuitant distrained upon the freehold for arrears of the annuity. In replevin:—Held, that the will, even as against the annuitant claiming under it, did not dispense with proof that the testator died possessed of the leasehold.

An annuitant claiming under a will, who has never received the annuity, is not barred by the 3 & 4 Will. 4, c. 37, ss. 2, 3, although more than twenty years have elapsed since the right to the annuity first accrued to him.

REPLEVIN for chattels distrained in a dwelling-house, farm, and lands, in the parish of Uffculme, in the county of Devon, on the 17th March, 1835.

The defendants in their avowry and cognizance stated that the dwelling-house, farm, land, and premises in which &c., theretofore, to wit, on the 10th November, 1804, were the freehold premises of one John Salter, since deceased, late father of the defendant Salter, and continued so until and at the time of the decease of the said John Salter; that the taking the said goods and chattels as in the declaration mentioned, was done under and in pursuance of a certain power contained in the last will and testament of the said John Salter deceased, bearing date the third August, 1800, for raising and paying a certain annuity, yearly rent, or sum of 30*l.* given and bequeathed in and by the said will to the defendant Salter, and charged and chargeable on the said freehold premises of the said John Salter deceased; and because the sum of 870*l.*, part of the said annuity, yearly rent, or sum of 30*l.*, accruing due at Christmas Day last, was behind and unpaid for the space of twenty days after the said Christmas Day,

the same having been lawfully demanded and not paid, the defendant Salter in his own right well avowed, and the other defendant, as bailiff to the defendant Salter, well acknowledged the taking the said goods and chattels in the declaration mentioned, to satisfy the said arrears, according to the purport, tenor, and effect of the said will: and this the defendants were ready to verify &c.

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The plaintiff pleaded in bar—First, that the said John Salter deceased late father of the defendant Salter, in and by his said last will and testament, bearing date (to wit) the day and year in the avowry and cognizance mentioned, ordered and directed that the said annuity, yearly rent, or sum of 30*l.* thereby bequeathed to the defendant Salter, as in the avowry and cognizance was mentioned, should be paid and payable out of certain leasehold premises, to wit, the undivided moiety or halfendal of certain leasehold estates called Astons and Chapples, otherwise Elford; and did in and by his said last will and testament charge and subject the said leasehold estates called Astons and Chapples, otherwise Elford, to and with the payment of the said annuity, yearly rent, or sum of 30*l.*, accordingly; and did thereby declare, that, in case the said annuity, or yearly rent or sum of 30*l.*, or any part thereof, should at any time during the life of the said defendant Salter be behind and unpaid for the space of twenty days next over or after any or either of the periods or days of payment whereon the same was directed to be paid, being lawfully demanded and then not paid, that then and so often it should and might be lawful to and for the defendant Salter to enter upon the said premises thereby charged with the said annuity, and to distrain for the same or so much thereof as should be so in arrear; and the testator did thereby further declare, that, in case the said moiety or halfendal of the said leasehold estates should prove insufficient to discharge the said annuity of 30*l.*, then that such deficiency should be made up

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out of the rents and profits of the testator's freehold premises situate in the county of Devon; and the testator did thereby also in that case charge the same and every part thereof to and with the payment of such deficiency, and gave unto the defendant Salter, in case of the nonpayment thereof upon the said days or times thereafter mentioned, such and the like power of distress for the arrears of the said annuity upon the said freehold premises as was thereinbefore by him given to the defendant Salter in that behalf upon the testator's leasehold estates; that the testator did not by his last will and testament further or otherwise charge the said annuity on his freehold premises, or any part thereof; that the testator afterwards, to wit, on the 1st May, 1805, died possessed of the said moiety or halfendel of the said leasehold estates in the will mentioned, without revoking or altering his said will; and that the said moiety or halfendel of the said leasehold estates in the will mentioned, at the time of the decease of the testator, was, and thenceforth hitherto had remained and continued sufficient to discharge the said annuity, yearly rent, or sum of 30*l.* in the said avowry and cognizance mentioned: and this the plaintiff was ready to verify—Secondly, That the said distress in the avowry and cognizance mentioned was not made at any time within twenty years next after the times at which the right to make a distress for the arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant Salter: and this the plaintiff was ready to verify.

Replication.

The defendants replied, that the testator did not die possessed of the said moiety or halfendel of the said leasehold estates, or any part thereof, in manner and form as in the first plea was alleged: and, as to the second plea, so far as the same related to 585*l.*, part of the money in the avowry and cognizance mentioned, that the distress was made within twenty years next after the time at

which the right to make a distress for the said sum of 585*l.*, and every part thereof, being the arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant Salter: and, as to the residue of the second plea in bar, so far as the same related to the residue of the money in the avowry and cognizance mentioned, the defendants relinquished their avowry and cognizance and prayer of judgment, so far as the same related thereto.

The cause was tried before Gurney, B., at the last Assizes at Exeter. No evidence was offered on the part of the plaintiff to shew that the testator died possessed of the leasehold mentioned in the will; but it was contended that the defendant, claiming under the will, was estopped from disputing any statement therein contained, and consequently that, as against him, it might be assumed that the testator died possessed of the property upon which he had first charged the annuity given to the defendant: it was also submitted, that, inasmuch as the defendant's right to the annuity first accrued to him more than twenty years before the distress, his claim was barred by the 3 & 4 Will. 4, c. 27, s. 2. The defendant had never received any payment on account of the annuity. The learned judge, yielding to the argument, directed a verdict to be entered for the plaintiff—affirming that there were leaseholds of the testator at the time of his death out of which the annuity might have been satisfied, and that the right to distrain first accrued to the annuitant more than twenty years past.

Bompas, Serjeant, in Michaelmas Term, obtained a rule nisi for a new trial.—He submitted that, the annuity being charged upon the testator's freehold property in the event of the leasehold proving insufficient to satisfy it, it was incumbent upon the plaintiff, who sought to impeach the validity of the distress upon the freehold, to shew the existence of leasehold to which resort might have been had

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in the first instance, and that the mere mention of death in the will did not dispense with proof that such leasehold was in the testator's possession at the time of his death; and, with respect to the second point, the House held that the statute was not applicable to the case where the party having the right has since his death enjoyed it, and afterwards been dispossessed of it for a period of twenty years; and the 3rd section expressly excluding the case of a right accruing under a will; and, further, that the 11th section, which enacts, "that when any such acknowledgment as aforesaid [of the title of the person entitled to any land or rent] is in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest, at any time within five years next after the passing of this Act," afforded a perfect answer to the objection.

• Sic.

Erie showed cause. A legatee claiming a specific legacy in an action, thereby admits that the testator died possessed of it, and a party who claims under another is bound by his declarations. In *For v. Finch*, 1 Taunt. 144, upon an issue between A. and B. whether C. died possessed of certain property, it was held that evidence might be given of declarations made by C. that she had assigned the property to A. [Tindal, C.J.—The ground of that decision was that the admissions were against the interest of the party making them.] The assent here, claiming under the testator, is clearly bound by his declarations.

and the will amounts to a declaration that he was possessed off the leasehold. 2 Williams's Law of Executors, 887; *Dillon v. Foster*, 1 Swanst. 359. The avowant's claim is barred by the statute 3 & 4 Will. 4, c. 27. The 2nd section enacts, *that, after the 31st December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.* Here, the testator died in November, 1804, consequently the avowant's right to make the distress first accrued to him in the year 1805; and it is not competent to him to split his demand, and distrain for a part only. In *Hutchins v. Chambers*, 1 Burr. 589, Lord Mansfield says: "A man who has an entire duty shall not split the entire sum, and distrain for part of it at one time, and for other part of it at another time, and so, toties quoties, for several times; for that is great oppression. And that is the case of *Wallis v. Savill*, 2 Lutw. 1352, where the second distress was holden unjustifiable." And this was clearly an estate or interest in possession within the meaning of the 3rd section, which enacts "that, when the estate or interest claimed shall have been an estate or interest in reversion or remainder or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession." The intention of the act was to relieve the possessors of estates from dormant claims; and this case is clearly one that falls within the mischief the act meant to provide against.

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Bomper, Serjeant; and Butt, in support of the rule.—
 The affirmative of the issue, viz. that the testator died possessed of the leasehold, was upon the plaintiff. The will was no evidence of that fact; for, the testator might have been possessed of the leasehold when he made his will, and might have parted with it before his death.—
 The case is not within the 3 & 4 Will. 4, c. 27, ss. 2, 3; and, if there be any doubt, it is within the protection of the 15th section. If the 2nd section be taken alone, the avowant was clearly entitled to distrain for the nineteen and a half years' arrears, no part of which became due twenty years before the making of the distress. The 2nd section is to be governed in its construction by the 3rd, which provides, "That, in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned;" it then proceeds to provide for the following cases—1. "When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received:" 2. "And when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death:" neither of these apply to the pre-

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sent case; the latter might, had this been a rent-charge bequeathed under a power: 3. "And when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assumed by any instrument (*other than a will*) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt, by virtue of such instrument:" by this the case of a gift *by will* is expressly excepted: 4. "And when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession:" here, no person has ever been in possession of the annuity: 5. "And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken:" that clearly is not this case: the avowant's claim as to the nineteen years and a half is not barred by any provision in the statute. [*Bosanquet, J.*—The argument on the part of the avowant appears to be this—that, if the annuitant had under this will received the annuity for the first half-year, and twenty years had been suffered to elapse without any further payment on account of the an-

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nuity, his right would be gone; but that inasmuch as here it has never been received at all, the statute is no bar.] If this had been an annuity granted by deed, (although the annuitant had never been in actual receipt of the annuity, the twenty years' limitation would have commenced running from the date of the deed.) But the case of an annuity created by a will, is expressly excepted out of the statute; and the possession by the testator of the estate out of which the annuity is made payable, does not bring it within it. [Beaumont, J., referred to the 42nd section, which enacts, "that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but *within six years next after the same respectively shall have become due*, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."] The plaintiff not having pleaded, could not avail himself of a defence arising out of that section; supposing it to apply to a case of this description. No adverse possession against the avowant was proved, and none can be presumed; consequently he is entitled to the extended period provided by the 15th section. [Tindal, C. J.—Should not that have been replied?]

TINDAL, C. J.—Two points are presented for our consideration in this case; the one arising on the issue joined on the first plea in bar; the other, on the second plea, which sets up as an answer to the avowant's right to distrain the statute 3 & 4 Will. 4, c. 27. The first point arises out of a distress made by the avowant on certain freehold premises in the parish of Uffculme. The avowant in answer states that one John Salter, deceased, the father of

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the avowant, being seised of the premises, charged them with an annuity of 80*l.* per annum in the avowant's favour; and that, 80*l.* of the annuity being in arrear, he distrained for it. The first plea in bar states that the annuity was charged upon certain leasehold premises, and, in case such leasehold premises should prove insufficient to discharge the said annuity, that such deficiency should be made up out of the rents and profits of the testator's freehold property; that the testator died possessed of the said leasehold, and that it was sufficient at his decease to discharge the said annuity: to this the avowant replies that the testator did not die possessed of the leasehold. The first issue, therefore was, whether or not the testator died possessed of the leasehold premises. At the trial no evidence was offered to shew that the testator was at the time of his death possessed of any leasehold property: but, on the part of the plaintiff, it was urged, that, inasmuch as the avowant sought by this distress to enforce payment of an annuity which he claimed under the will, the testator must, as against a party so claiming, be taken to have died possessed of the property upon which the annuity was charged. That would have been a strong argument had the payment of the annuity been directed to be made out of one species of property only: but, as the testator charged the annuity first upon the leasehold, and then, in the event of the leasehold proving to be insufficient, upon the freehold, and as he might between the time of making his will and his death have parted with the leasehold, the conclusion contended for on the part of the plaintiff seems to me entirely to fail. The plaintiff ought to have been prepared with evidence that the testator died possessed of the leasehold: to let in evidence of that fact, therefore, there must be a new trial.

With respect to the other point—The second plea in bar states that the said distress in the avowry and cognizance mentioned was not made at any time within twenty

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years next after the times at which the right to make a distress for the arrears of the said annuity first accrued to the widow. This brings us to the consideration of a most important question—whether within the meaning of the statute 3 & 4 Will. 4, c. 27, a party who has never been in receipt of an annuity granted more than twenty years prior to the time at which he lays claim to it, may still distrain for arrears that have accrued within the last twenty years, or whether his claim to the annuity is under such circumstances absolutely barred. I am of opinion that the facts disclosed on this record withdraw the case from the operation of the act. The second section of the act provides that “no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.” The next section explains when the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have *first accrued*. It appears to me that the circumstances of this case do not bring it within either of those that are contemplated by this 3rd section. I place no reliance upon the 15th section; for, if the party had intended to avail himself of that section, he should have replied that the possession of the annuity was not adverse to him at the passing of the act. It is perfectly clear that this case does not fall within either the first or second branches of the 3rd clause: it could only fall within the third, and by that the case of a claim under a will is expressly excepted—“when the person claiming such land or rent shall claim in respect of an estate

on interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some other person, through whom he claims, by such person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument." Upon both points, therefore, I am of opinion there should be a new trial.

PARK, J.—Upon the second point I could have wished for further time to consider; though I am disposed to concur with his lordship in thinking that the statute referred to does not control this case, Mr. Butt having, as I conceive, clearly shewn that it falls within neither branch of the 3rd section. As to the other point: no evidence was offered to shew that the testator possessed leasehold at his death: there must therefore be a new trial.

GASKELL, J.—If the court had on this occasion been disposed to settle the point raised upon the statute, I also should have desired time to consider it: the question is one of great importance, arising upon the construction of an act of parliament which has not yet been the subject of an adjudication in either of the courts. Before the cause goes down again, I should recommend the parties to revise their pleadings. The avowry seems to me not to be supportable: there is no allegation in it as to whether or not the testator died possessed of the leasehold property; it would probably be better that that fact should appear. The matter ought to be so put that an ulterior judgment might if thought necessary be taken upon it.

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BOSANQUET, J.—Upon the first issue the question is whether or not any presumption arises from the fact of the avowry setting out the will under which the avowant claims, that the testator died possessed of leasehold property. The distress was made on the freehold. The avowant may be insisting that the annuity passed to him whether there was leasehold property out of which it could be satisfied or not. It appears to me that no inference results from the avowry, that the testator died possessed of any leasehold. The other question is one of great importance—whether an annuity which has never been received at all will entitle the annuitant to distrain for arrears accruing within the last twenty years. It is admitted that the right of distress would be barred if the first year's annuity had been received, and none had been paid since; but it is contended that, the annuity never having been paid at all, the statute does not operate in bar of the avowant's claim, notwithstanding the lapse of more than twenty years since the right first accrued to him. If the matter stood simply on the 2nd section of the statute, it might have admitted of question whether the intention of the legislature was not, that, if the rent were at any time suffered to be in arrear for twenty years, the right of distress should be barred. But the 3rd section gives a detailed definition of what shall be held to fall within the 2nd section, with regard to the time of the accrual of the right. This case does not fall within either of the explanatory instances contained in the 3rd section. That being so, it appears to me, as at present advised, that the right of distress in question was not barred by the statute.

Rule absolute (a).

(a) See *Doe d. Corbyn v. Bramston*, 3 Ad. & E. 63, a decision on the 3 & 4 Will. 4, c. 27, s. 17. And see the remarks of Mr. Hayes upon

this statute, in the forthcoming edition (3rd) of his valuable *Treatise on Conveyancing*.

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WADDILOVE v. BARNITT.

ASSUMPSIT for use and occupation.—Plea, non assumpsit. At the trial before Vaughan, J., at the Sittings in London in Easter Term last, it appeared that the defendant had been let into the possession of the premises in question under an agreement in writing between himself and the plaintiff, made on the 19th December, 1826, which stipulated that the occupation should commence upon and from that day, but that the rent should become payable only from Midsummer, 1828. The action was brought for arrears of rent accruing under this agreement. On the part of the plaintiff, it was proved, that, in 1831, he had distrained for rent due in respect of the premises, and that the defendant on that occasion gave him a bill of exchange in satisfaction of the arrears due. The defendant proposed to shew, that, prior to the date of the agreement, the plaintiff had mortgaged the premises; and that, after the rent in question became due, but before any rent had been paid, the mortgagee had given him notice not to pay the same to the mortgagor. The learned judge thought that this evidence was by the new rules in pleading of Hilary Term, 4 Will. 4, precluded from being given under non assumpsit. A verdict was thereupon taken for the plaintiff, for 81*l* 5*s*.

Bompas, Serjeant, in Easter Term last, obtained a rule nisi for a new trial, on the ground that the evidence tendered had been improperly rejected.

Busby, in Michaelmas Term, shewed cause.—The defendant having come in under the plaintiff upon an express contract in writing, and having acquiesced in his title as landlord by submitting to a distress, he is estopped from now disputing it. In *Panton v. Jones*, 3 Camp. 372, it was

Assumpsit for use and occupation of premises into possession of which the defendant entered under an agreement in writing between himself and the plaintiff:—Held, that, under non assumpsit, the defendant might give in evidence the fact of the plaintiff having mortgaged the premises before his tenancy commenced, and that he had received notice from the mortgagee not to pay rent to the mortgagor; these facts merely amounting to a denial of a matter of fact stated in the declaration from which the promise in law is implied.

But, held, that the defendant could only under that plea discharge himself as to the rent that became due *after* the notice: as to the by-gone rent, the matter must be pleaded specially.

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expressly ruled, that, if the occupier of a house submits to a distress for rent stated in the notice of distress to be due from him as tenant to the distrainor, this is an acknowledgment of the tenancy. At all events, if the defendant had intended to rely on the fact of the plaintiff's title having expired, he should have pleaded specially the mortgage and the notice served upon him by the mortgagee; for, by the rule of Hilary Term, 4 Will. 4, Assumpsit, 1, it is provided, that, "in all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." In *Edmunds v. Harris*, 4 N. & M. 182, in debt for goods sold and delivered, the defendant pleaded *nunquam indebitatus*: and it was held that he could not give in evidence under this plea that the goods were sold on a credit that had not yet expired. And in *Barnett v. Glossop*, ante, Vol. 1, 621, 1 New Cases, 683, 3 Dowl. 625, it was held, in assumpsit for the price of a copyright bargained and sold, that a defence on the ground that the copyright was not assigned in writing must be pleaded specially.

Bompas, Serjeant, in support of his rule.—The effect of the mortgage was entirely to divest the title of the mortgagor. The instant the mortgagee claims or gives notice to the tenant not to pay rent to the mortgagor, the interest of the latter is at an end: and it makes no difference whether the mortgage was made before or after the tenancy commenced. In *Moss v. Gallimore*, 1 Doug. 279, it was held that a mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards; and he may distrain for it after such notice. And it is competent to the tenant, under non assumpsit, to give in evidence that

the authority of the mortgagor to receive the rent has been determined by a notice from the mortgagee. In *Barnett v. Glossop*, the bargain was admitted; but the defendant sought to avoid it by shewing that the requisitions of a statute had not been complied with in the transfer of the copyright: whereas here the defendant merely asserts that he has not used and occupied the plaintiff's premises. In *Cousins v. Paddon*, 2 C. M. & R. 547, it was held, that, under the general issue to an action for goods sold and delivered, or for work and labour done, the defendant may prove (even since the new rules) that the goods delivered were not such as were contracted for, or that the work was done in an unworkmanlike manner, although there was a special contract to pay for the goods or work at a certain price. [*Tindal*, C. J.—The defendant was let into possession as tenant. Until the mortgagee asserted his right, the defendant could not dispute the mortgagor's title: the question therefore is whether this is not rather like the case of an eviction, which must be pleaded specially.] If the premises were held under a lease or a special agreement for a term, and the plaintiff declared thereon, the defendant would be bound to plead the eviction: but the facts which would amount to an eviction may be given in evidence under non assumpsit where the plaintiff declares simply for the use and occupation.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—This was an action of assumpsit for use and occupation, to which the defendant pleaded non assumpsit: and the only question on the trial was, whether, consistently with the new rules in pleading made in Hilary Term, 4 Will. 4, the defence intended to be set up at the trial could be given in evidence under that plea. It appeared at the trial, upon the plaintiff's evidence, that the defendant had been let into possession of the premises in question under

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a written agreement made between the plaintiff and the defendant on the 19th December, 1826, by which it was stipulated that the occupation should commence from that day, but that the rent should become payable from Midsummer, 1828, and the action was brought for arrears of rent which accrued under that agreement. In answer to the action, the defendant tendered evidence, that, before the agreement was made, the plaintiff had mortgaged the premises, and that, after the agreement, the mortgagee had given notice to the defendant to pay all arrears of rent then due, and all future rent that should become due, to him, the mortgagee, and not to the mortgagor. This evidence was rejected by the learned judge at the trial of the cause, as inadmissible under the proper construction of the new rules, and the plaintiff recovered a verdict for 81*l.* 5*s.*: and whether this evidence ought to have been admitted is the only question that has been raised before us. It does not appear distinctly upon the evidence whether the money claimed by the plaintiff for use and occupation became due from the defendant before or after the notice given by the mortgagee, or whether part became due before and part after the delivery of such notice: and, as the question appears to us to call for a different answer, according to the time when the rent became due, it will be right to consider it, first, upon the supposition that all the rent accrued due *after* the notice given, and next, that all or part of the rent became due *before* the notice. That the state of facts offered to be proved would have constituted a defence in law to the plaintiff's action under the plea of non assumpsit, before the new rules were in force, may be considered as decided by the case of *Pope v. Bigg*, 9 B. & C. 245, 4 Man. & R. 193. In that case it was held, that, as to all the rent due, both the arrears before the notice given, and the rent which fell due after such notice, the occupier of land who had been let into possession by the mortgagor, and held the land by his

permission, might discharge himself as to him by payment to the mortgagee, after such notice, under the plea of nil debet. And, indeed, in the course of the argument before us, the objection has not been that the tenant cannot be allowed to set up this defence on the ground that he would be disputing his landlord's title, but simply on the ground that the defence ought to have been specially pleaded: whereas, it is manifest, that, if the defence itself was inadmissible, on the principle above referred to, it would be equally inadmissible whether put upon the record or only given in evidence. Now, the terms of the rule in question, so far as it applies to the present case, are these: "the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." And we are of opinion, with respect to the rent which becomes due for use and occupation *subsequent* to the notice given by the mortgagee, that the evidence offered was admissible, inasmuch as it amounts to a denial of a matter of fact stated in the declaration from which the promise in law is implied, and to nothing more. The action is brought for a reasonable satisfaction given by the statute 11 Geo. 2, c. 19, s. 14, for the use and occupation of land held and enjoyed by the defendant. It is therefore a matter of fact stated in the declaration from which the promise arises by operation of law, "that the defendant held and enjoyed the premises in question by the permission or sufferance of the plaintiff:" for, as to the circumstance on which considerable stress was laid by the plaintiff's counsel in the course of the argument, that the defendant entered under an express agreement in writing, it appears to a majority of the judges that it makes no difference in the application of the rule of pleading; for, it is only one mean of proof, amongst many others, that the occupation was by the permission of the plaintiff. But, from the

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a written agreement made between the defendant on the 19th December, 1828, stipulated that the occupation should be for one day, but that the rent should be paid in the summer, 1828, and the action was brought for the rent which accrued under the agreement. The defendant pleaded that the agreement was made on the premises, and that, after the agreement was made, he had given notice to the plaintiff to pay the rent then due, and to him, the mortgagee, the evidence was given.

the plaintiff's plea was that by permission of the mortgagee, the defendant had taken possession and avoidance that he held the premises for the mortgagee during the same time for which the rent became due; it is an allegation inconsistent with the evidence, and amounts to a denial of it: and it is upon that principle we hold the evidence admissible under the present plea. If therefore all the rent had become due after the delivery of the notice, we should have held such evidence an answer to the action. But, if part became due before, we think the same construction of the rule of pleading does not apply as to such arrears already due; for, as to those arrears, the occupation has already taken place; and such occupation was in fact by the permission and sufferance of the plaintiff, under whom the defendant was let into possession: the mortgagee had a right of action against the defendant up to the time when the notice was given; and it seems to us to be difficult to maintain, that, because the mortgagee afterwards interferes and requires the rents already due from the occupier to be paid to him, the character and consequences of this by-gone occupancy can thereby be altered, or that this right of action which has already vested in the plaintiff

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can thereby be taken away. As to this by-gone rent we think this evidence does not amount to a denial of the allegation that the occupation was by the plaintiff's permission; but to a confession and avoidance only, viz. that the defendant had occupied by permission and sufferance of the plaintiff who was mortgagee in possession, and that, after the rent in question became due, he received a notice from the mortgagee (to whom the mortgagor was only a receiver in point of law), requiring him to pay over the rent to him the mortgagee, and thereby had determined the authority of the plaintiff to receive the rent. With respect therefore to so much of the rent, we think there is no answer on the present state of the pleadings. On the whole, therefore, the rule for a new trial must be made absolute: but the necessity of a new trial may possibly be avoided by the arrangement of the parties to whom the real state of the facts is well known.

Rule absolute.

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SYMES v. GOODFELLOW.

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ASSUMPSIT for goods sold and delivered, money lent &c., and for board and lodging for the defendant's wife and child. Plea—non assumpsit. By an order of Nisi Prius, the cause, "and any other between the same parties in respect of the same species of demand at a later period, if any other shall be pending," were referred to a barrister. On the hearing, evidence was offered on behalf of the defendant, in answer to the demand for the board and lodging, of acts of adultery by his wife. For the plaintiff it was objected, that such defence could not be resorted to under non assumpsit: and the rule of Hilary Term, 4 Will. 4, Assumpsit, 3, was relied on—"In every species of assumpsit, all matters in confession and avoidance, in-

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In assumpsit for board and lodging furnished to the defendant's wife, an arbitrator to whom the cause was referred admitted evidence of the wife's adultery to be given under non assumpsit, in answer to the action:—
The court refused to set aside the award.

Quære whether such a defence could properly be offered under such a plea.

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a written agreement made between the plaintiff and the defendant on the 19th December, 1826, by which it was stipulated that the occupation should commence from that day, but that the rent should become payable from Midsummer, 1828, and the action was brought for arrears of rent which accrued under that agreement. In answer to the action, the defendant tendered evidence, that, before the agreement was made, the plaintiff had mortgaged the premises, and that, after the agreement, the mortgagee had given notice to the defendant to pay all arrears of rent then due, and all future rent that should become due, to him, the mortgagee, and not to the mortgagor. This evidence was rejected by the learned judge at the trial of the cause, as inadmissible under the proper construction of the new rules, and the plaintiff recovered a verdict for 81*l.* 5*s.*: and whether this evidence ought to have been admitted is the only question that has been raised before us. It does not appear distinctly upon the evidence whether the money claimed by the plaintiff for use and occupation became due from the defendant before or after the notice given by the mortgagee, or whether part became due before and part after the delivery of such notice: and, as the question appears to us to call for a different answer, according to the time when the rent became due, it will be right to consider it, first, upon the supposition that all the rent accrued due *after* the notice given, and next, that all or part of the rent became due *before* the notice. That the state of facts offered to be proved would have constituted a defence in law to the plaintiff's action under the plea of non assumpsit, before the new rules were in force, may be considered as decided by the case of *Pope v. Bigg*, 9 B. & C. 245, 4 Man. & R. 193. In that case it was held, that, as to all the rent due, both the arrears before the notice given, and the rent which fell due after such notice, the occupier of land who had been let into possession by the mortgagor, and held the land by his

permission, might discharge himself as to him by payment to the mortgagee, after such notice, under the plea of nil debet. And, indeed, in the course of the argument before us, the objection has not been that the tenant cannot be allowed to set up this defence on the ground that he would be disputing his landlord's title, but simply on the ground that the defence ought to have been specially pleaded: whereas, it is manifest, that, if the defence itself was inadmissible, on the principle above referred to, it would be equally inadmissible whether put upon the record or only given in evidence. Now, the terms of the rule in question, so far as it applies to the present case, are these: "the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." And we are of opinion, with respect to the rent which becomes due for use and occupation *subsequent* to the notice given by the mortgagee, that the evidence offered was admissible, inasmuch as it amounts to a denial of a matter of fact stated in the declaration from which the promise in law is implied, and to nothing more. The action is brought for a reasonable satisfaction given by the statute 11 Geo. 2, c. 19, s. 14, for the use and occupation of land held and enjoyed by the defendant. It is therefore a matter of fact stated in the declaration from which the promise arises by operation of law, "that the defendant held and enjoyed the premises in question by the permission or sufferance of the plaintiff:" for, as to the circumstance on which considerable stress was laid by the plaintiff's counsel in the course of the argument, that the defendant entered under an express agreement in writing, it appears to a majority of the judges that it makes no difference in the application of the rule of pleading; for, it is only one mean of proof, amongst many others, that the occupation was by the permission of the plaintiff. But, from the

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with the defendants, by which it was agreed that the plaintiff's ship Jane should receive on board a cargo of coals or such other legal goods as the said merchants might cause to be sent alongside, and should proceed therewith to Solada, in the river Plata, and either there deliver the same or proceed to Buenos Ayres (provided the blockade of the latter port should then be known to be raised), and there deliver the same; and should then reload at the port of delivery all such legal goods as the said freighters' agents might cause to be shipped; and, being so loaded, should therewith proceed to a safe port between Gibraltar and Antwerp, both inclusive, calling at the former port for orders, if so required, and deliver the same according to the custom of the port: freight for the said voyage out and home 1800*l.* in full, if delivered at Gibraltar, a port in Spain, or London, or Liverpool; and 5*l.* per cent. thereon additional if delivered at a port in France or at Antwerp; together with a gratuity of 50*l.* to the said master should he succeed in breaking the blockade at Solada inwards and outwards (restraint of princes and rulers, the act of God, the king's enemies, piracies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever, during the said voyage, always excepted): the freight to be paid as follows, viz. 200*l.* to be paid in London on the vessel being dispatched from Portsmouth, cash for the necessary expenses of the vessel in the river Plata to be advanced there at the current rate of exchange upon London, free of commission, and the remainder to be paid, on final delivery of the homeward cargo, in cash, and at the current exchange of London if delivered at a foreign port. Sixty running days were to be allowed the said merchants, if the vessel was not sooner dispatched, for loading the ship at the river Plata and delivering at the final port of discharge: the vessel to be dispatched from Portsmouth on or before the

23rd October, 1828, and thirty days to be allowed on demurrage if required, over and above the said lay days, at 4*l.* 4*s.* per day: the master, if required, to sign bills of lading for more or less freight than above stipulated, without prejudice to the charterparty: the vessel to be consigned to the freighters or their agents at the ports of loading or unloading. Penalty for nonperformance of the agreement 1800*l.* The merchants were to have the option at the ports of loading to send their own stevedores to stow the cargo; and all parts of the vessel, except the cabin, the forecastle, and room for ship's stores, to be at the disposal of the freighters. During the voyage, a supercargo, if required, was to have a free passage out and home, he finding his own provisions and necessaries.

On the 23rd October, 1828, the *Jane* left Portsmouth on her voyage for Buenos Ayres; and on the 31st of the same month the defendants paid the plaintiff in London the sum of 200*l.*, pursuant to the agreement of charterparty. The *Jane* carried out eighty chaldrons of coals for Buenos Ayres in lieu of ballast, the bill of lading for which specified that freight was to be paid as per charterparty. The *Jane* arrived at Buenos Ayres in January, 1829, and delivered part of the coals to Messrs. Larrea, Brothers, on whose account as principals the charterparty in question had been effected by the defendants: part of the coals remained on board, with the consent of Messrs. Larrea, Brothers, as ballast: and, on the 21st of February, 1829, 5996 dry hides and 104 lining hides were laden on board, under a bill of lading by which they were to be delivered in good order and well conditioned at the port of Gibraltar, the dangers of the seas only excepted, unto Messrs. T. P. Echecopar & Co. in the first place, and to Mr. J. M. Hurtado in the second place, or to their assigns, he or they paying freight for the said goods at the rate of 4*l.* 10*s.* sterling per ton, with primage and average accustomed. The freight of the hides under the bill of

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lading was 340*l.*; and the rate therein stated of 4*l.* 10*s.* per ton, was the usual freight at that time of hides from Buenos Ayres to Gibraltar.

On the 28th February, 1829, Messrs. Larrea, Brothers, advanced to Captain Weddell the sum of 1071 current dollars for the necessary expenses of the vessel at Buenos Ayres, which sum, at the current rate of exchange upon London, was 66*l.* 3*s.* 11*d.* On the same 28th February, 1829, the *Jane* sailed for Gibraltar, and shortly afterwards sprung a leak, lost spars and sails, and, being otherwise much distressed and damaged, put into Fayal, one of the Azores islands, on the 21st May, 1829. She was then surveyed by competent persons, and condemned to be sold as unseaworthy and unfit for repair. The cargo, consisting of the coals and the hides, was taken out and landed at Fayal: 1475 hides were found damaged; and, in consequence of the damage, and under the directions of the Board of Health at Fayal, 1292 hides were sold as damaged; and 183 were thrown into the sea, under the direction of that board, as being utterly worthless. The coals were also sold: 120 hides which were moth-eaten, were sold by public auction; 200 further hides, which were not damaged, were sold by private contract: and the proceeds of the coals and of the whole of the damaged and undamaged hides that were sold, except the 224*l.* 3*s.* 9*d.* hereafter mentioned, were applied to defray the necessary charges of unloading, warehousing, cleaning and beating, and reloading the cargo. Besides the hides sold, 172 were retained by the British vice-consul for his commission of 6*l.* per cent. on the cargo forwarded.

After payment in manner aforesaid of the charges incurred in respect of the cargo up to the 10th July, 1829, Captain Weddell had in his hands a net balance of 1055 dollars, or 224*l.* 3*s.* 9*d.* English money, belonging to the defendants, with which balance in dollars he, on or about

the 12th July, sailed in the schooner *Swallow* for England. On the following day, the schooner was wrecked off the island of Pico, and Captain Weddell lost the dollars he had with him, as well as all his papers. Between the 21st May and the 23d July, 1829, no vessel had arrived at Fayal of capacity to carry on the cargo which Captain Weddell could engage; and, before his departure from Fayal, he left instructions with the British vice-consul at that place, to forward the remainder of the hides, being then 4138 in number, to be sent by the earliest opportunity to Gibraltar. On the 23rd, Captain Weddell addressed a letter to the vice-consul, stating his having been informed of the expected arrival of a vessel originally destined for Newfoundland, and recommending the vice-consul, if he could not obtain a reduction of 400*l.* for the freight, to give that sum for the conveyance of the remainder of the cargo to Gibraltar, rather than an opportunity of sending the cargo forward should be lost. On the next day, the 24th, Captain Weddell sailed again for England: and, on the 29th July the vice-consul entered into a charterparty for the schooner *Flora*, on the part and behalf of the owners of the cargo of hides landed from the brig *Jane*, to proceed therewith to Gibraltar, or so near thereto as she might safely get, and deliver the same, on being paid freight for the same the sum of 360*l.* sterling, with primage 5*l.* per cent.; the freight to be paid in cash on right delivery of the cargo. When that agreement of charterparty was made, 4138 hides of the cargo of the ship *Jane* remained at Fayal, of which 3959 were laden on board the *Flora*, and the bill of lading signed for the same by Alexander Christie, the master of the said vessel, by which they were to be delivered in good order and well conditioned at the aforesaid port of Gibraltar, unto Messrs. J. P. Echeopar & Co. in the first place, and Mr. J. M. Hurtado in the second place, or to their assigns, he or they

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paying freight for the said goods, as per charterparty, 360*l.* sterling, with 5*l.* per cent. primage. The remaining 179 hides would also have been stowed on board the *Flora*, had it not been for the want of proper stowers, who having absconded, the 179 hides were left behind. The 3959 hides were delivered at Gibraltar to Messrs. J. P. Echecopar & Co., who paid the freight and primage according to the bill of lading, amounting to 378*l.*, on the goods being delivered to them.

The question for the opinion of the court was, whether the plaintiff was entitled to any and what amount of freight from the defendants. If the court should be of opinion that the plaintiff was entitled to any freight, and that the excess of such freight beyond the sums paid by the defendants should amount to the verdict, then the verdict was to stand, or the damages were to be reduced on such principle and to such extent as the court should direct. But, if the court should be of opinion that the plaintiff was entitled to no freight under the circumstances above stated, or to no larger sum than he had already been paid, then a nonsuit was to be entered.

Shee, for the plaintiff.—The plaintiff is entitled to the full freight stipulated for by the charterparty, less the freight paid by the agents of the defendants for the conveyance of the hides saved from *Fayal*. The first objection on the part of the defendants is that the delivery of a full cargo at Gibraltar, the port of discharge, was a condition precedent to the plaintiff's right to demand freight. The agreement to deliver at Gibraltar does not go to the whole consideration: and where mutual covenants go only to a part of the consideration, an action lies for the breach of them, but they are not conditions precedent—*Boone v. Eyre*, 1 H. Bl. 273, n., 6 T. R. 573; 1 Wms. Saund. 323 b, n. (1). In *Ritchie v. Atkinson*, 10 East, 295, where the master and freighter of a vessel of four hundred tons mu-

tually agreed in writing, that, the ship, being every way fitted for the voyage, should with all convenient speed proceed to St. Petersburg, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* per ton, &c., one half to be paid on right delivery, the other at three months: it was held that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery. In *Davidson v. Gwynne*, 12 East, 381, where the master of a vessel covenanted with the freighter (inter alia) that immediately after being loaded and dispatched he would (wind and weather permitting) sail *with the first convoy* for the intended voyage; the voyage being in fact performed, it was held that the hire might be recovered, although the master had neglected to sail with the first convoy. And Lord Ellenborough said: "The principle of the decision in these and other like cases is, that, unless the nonperformance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages." Involved in this point is the question what is the duty of the master under circumstances like those that occur in the present case. The authorities seem clear that it is his duty, where the ship is disabled in the course of the voyage, to do his best to carry into effect the contract between his owners and the freighters; and that, having done so, and transhipped the cargo, the owners are entitled to the full freight contracted for. In *Abbott on Shipping*, 5th edit. 240, the rule is thus laid down: "If by reason of the damage done to the ship, or through want of necessary materials, she cannot be repaired at all, or not without

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very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination. But, if his own ship can be repaired, he is not bound to send the cargo by another, but may detain it till the repairs are made, and even hypothecate it for the expense of them; that is, supposing it not to be of a perishable nature: if it be of such a nature, and there be not time or opportunity to consult the merchant, he ought either to tranship or sell it, according as the one or the other will be most beneficial to the merchant. So if the ship has been wrecked, and the cargo saved. And if on the high seas the ship be in imminent danger of sinking, and another ship apparently of sufficient ability be passing by, the master may remove the cargo into such ship, and, although his own ship happen to outlive the storm, and the other perish with the cargo, he will not be answerable for the loss. The disposal, however, of the cargo by the master is a matter that requires the utmost caution on his part. He should always bear in mind that *it is his duty to convey it to the place of destination*. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method." This principle is even more clearly laid down by Lord Ellenborough in *Hunter v. Prinssep*, 10 East, 394—"If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination." The like doctrine prevails in the civil law throughout Europe: it is so laid down by Pothier, *Traité du Frêt*, 393; Pardessus, *Cours de Droits Commerciaux*, vol. 3, p. 77, s. 644; and by Dr. Story, in his edition of Abbott on Shipping, 301, et seq. [*Tindal*, C. J.—Did the captain in this case procure another ship? The charterparty for the hire of the *Flora* is stated to have been entered into by the vice-consul on behalf of the owners of the cargo.] The vice-consul acted

as the agent of the captain in the hire of the *Flora*. All that was done was done under his direction. The real object and effect of the contract must be looked at, and not merely the description which the vice-consul accidentally gives of himself in it. The contract on the plaintiff's part has substantially been performed: the defendants have received a certain benefit under it and are at all events liable for the freight of that portion of the cargo which did actually reach its destination. There are many authorities in the books to shew that freight *pro ratâ itineris* may be recovered for the portion of the voyage actually performed. An implied contract arises out of the merchant's acceptance of the cargo at a port short of the port of discharge. In *Luke v. Lyde*, 2 Burr. 882, 1 W. Bl. 190, where it was held, that, in case of a loss at sea, freight must be paid in proportion to the goods saved and the part of the voyage which has been performed, Lord Mansfield said: "If a freighted ship becomes accidentally disabled on its voyage, without the fault of the master, the master has his option of two things—either to refit it (if that can be done within convenient time) or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the *whole* freight of the *full* voyage; and so it was determined in the House of Lords in the case of *Lutwidge v. Grey*," Abbott on Shipping, 307. And in *Baillie v. Moudigliani*, 1 Park, Ins. 90, 2 Marsh. Ins. 736, his lordship says: "As between the owners of the ship and cargo in case of a total loss no freight is due, but as between them no loss is total where part of the property is saved, and the merchant takes it to his own use. In this case the value of the goods was restored in money, which is the same as the goods, and therefore freight was certainly due *pro ratâ itineris*." These cases are in no respect distinguishable in principle from the present: the owner is, at

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all events, clearly entitled to recover freight pro ratâ for that portion of the cargo which the merchants received.

Spankie, Serjeant, for the defendants.—By the terms of the charterparty a gross sum is to be paid as freight for the entire voyage contemplated: the merchant advances 200*l.* on the commencement of the voyage, and a further sum for the ship's use at Buenos Ayres, and the owner takes the chance of her arrival at the port of destination, which is a condition precedent to his right to demand the stipulated freight. The general principles upon this subject are extremely simple and well defined: to entitle the owner to recover, he must shew that he has performed the voyage contracted for. Here it is not found as a fact, nor does it in any way appear, that the condemnation of the vessel at Fayal was necessary: and there has been no final delivery of the homeward cargo with reference to the stipulations of the charterparty. In *Abbott on Shipping*, 273, it is said: "The contract for the conveyance of merchandize is in its nature an entire contract: and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and labour expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week. The cases in which a partial payment may be claimed, are exceptions to the general rule, founded upon principles of equity and justice as applicable to particular circumstances." The learned author, after having considered the cases in which the entire freight is to be paid according to the agreement, says, p. 300—"I now proceed to the consideration of those in which a part only of the stipulated sum may be claimed. And these are—first, when the ship has performed the whole voyage, but has brought a part only of the merchant's goods in safety to the place of destination—and,

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secondly, when the ship has not performed the whole voyage, but the master has delivered the goods to the merchant at a place short of the port of destination. In the case of a general ship, or of a ship chartered for freight to be paid according to the quantity of the goods, there can be no doubt that freight is due for so much as shall be delivered; the contract in these cases being distinct, or at least divisible in its own nature. But, suppose a ship chartered at a specific sum for the voyage, without relation to the quantity of the goods (in which case the contract, as observed by Lord Chancellor Hardwicke, in the case of *Paul v. Birch*, 2 Atk. 621, is more properly a contract for the use of the ship, than for the conveyance of the merchandize), should lose part of her cargo by a peril of the sea, but convey the residue to the place of destination; in this case, I do not find any authority for apportioning the freight. And it seems to have been the opinion of Malynes (*Lex Mercat.* p. 100) that nothing would be due; and the case of *Bright v. Cowper*, 1 Brownlow, 21, may be considered as an authority in support of that opinion. But, probably, if the question should arise again, the determination of it would depend upon the particular words of the charterparty; for, without a very precise agreement for that purpose, it seems hard that the owners should lose the whole benefit of the voyage, where the object of it has been in part performed, and no blame is imputable to them." In *Ritchie v. Atkinson*, the freight was to be paid at so much per ton, and not in a gross sum for the voyage: and Lord Ellenborough says: "Where, as in *Smith v. Wilson*, 8 East, 437, the freight is made payable upon an indivisible condition, such as, in that case, the arrival of the ship with her cargo at her destined port of discharge, such arrival &c. must be a condition precedent, because it is incapable of being apportioned; but here the delivery of the cargo is in its nature divisible; and, therefore, I think it is not a condition precedent; but the

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plaintiff is entitled to recover freight in proportion to the extent of such delivery, leaving the defendant to his remedy in damages for the short delivery." And Bayley, J., says: "In *Bright v. Cowper*, an entire sum was to be paid; and therefore, unless the plaintiff was entitled to recover the whole, he could not recover any part. Unless, therefore, there was a performance of the whole for which that entire sum was to be paid, which there was not, he could recover nothing. But there is nothing here to shew that it was the intention of the parties that the delivery of a complete cargo should be a condition precedent to the recovery of any freight actually earned." In *Cook v. Jennings*, 7 T. R. 381, it was held, that, in an action of covenant on a charterparty of affreightment, in which the defendant covenanted to pay so much for freight for "goods delivered at A.," freight cannot be recovered pro ratâ itineris if the ship be wrecked at B. before her arrival at A., though the defendant accepted his goods at B. Lord Kenyon there lays down the principle upon which the present case must be determined. He says: "By the terms of this agreement the defendant engaged to pay so much on delivery of the goods at Liverpool, one fourth in cash on her arrival, and the remainder by an acceptance at four months: but the goods never arrived; then, at what time were those bills to be dated? We do not sit here to make, but to enforce contracts: and the question put to us is, whether the freight is to be paid under this contract, though the ship never arrived, but was lost before her arrival at Liverpool: upon which I cannot bring my mind to doubt. The case of *Luke v. Lyde* is very distinguishable from the present, that being the case of a general assumpsit for the freight of goods; in which Lord Mansfield states the marine law on this subject. But what has the case of an implied contract to do with an express contract? Lord Coke says *expressum facit cessare tacitum*. Here the parties are bound by a precise agreement.

Then it is suggested that we ought not to give effect to this contract, because it is unreasonable: but we are to decide according to the contract of the parties; and the law says, that, if A. covenant to enfeoff B., A. is not released from his covenant, though B. will not accept livery of seisin, unless the act be frustrated by the act of the covenantee. It is not necessary now to determine whether or not the plaintiff might not have brought an action of assumpsit; it will be time enough to decide that case whenever the question arises. But here the question is, whether or not he can enforce payment of the money under this contract, not having carried the goods to Liverpool, and the defendant having only undertaken to pay on their delivery at Liverpool; in answer to this action, the defendant has a right to say *non hæc in fœdera veni*." The other judges were of the same opinion; Grose, J., cited *Bright v. Couper*, as a direct authority against the plaintiff; and Lawrence, J., added: "When a ship is driven on shore, it is the duty of the master either to repair his ship or to procure another; and, having performed the voyage, he is then entitled to his freight: but he is not entitled to the whole freight, unless he perform the whole voyage, except in cases where the owner of the goods prevents him; *nor is he entitled pro rata unless under a new agreement*. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties: but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action." To this Abbott, C. J., adds (p. 317)—"I presume the learned judge, in thus speaking of the duty of the master, must be understood to have expressed himself with a view to the master's claim of his whole freight." Here, the second ship was not liable to the performance

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of that which it was stipulated that the first ship should perform: there has been no performance of the conditions of the first charterparty, and consequently no liability in the freighters to pay the gross sum. Then, the next question is, whether, under the circumstances, the plaintiff is entitled to freight pro ratâ itineris. In *Lutwidge v. Grey* and *Luke v. Lyde*, the nonperformance of the first contract is implied. Here the master of the *Jane* evinced no intention to keep alive the contract. It was his duty, if he wished to entitle himself to freight, to provide at his own expense a new ship to convey the goods to their destined port—2 Valin, 64; *Roccus de Navibus et Naulo*, 81. Here the second ship was hired at the expense of the merchants, and by a person acting as their agent. [*Tindal*, C. J.—The difficulty I feel in saying that the plaintiff is not entitled to freight pro ratâ itineris is, that the goods arrived at Fayal, and were there accepted by the merchants.] The acceptance of the goods by the merchants was compulsory: the master had abandoned them. Abbott, C. J., after citing *Osgood v. Groving*, 2 Camp. 466, and other cases, says (p. 317): "These cases establish that acceptance of the goods is necessary to found an implied contract for the payment of freight pro ratâ itineris. In the case of *Luke v. Lyde*, the acceptance was the only ground upon which the implication could be raised, and must have been thought a sufficient ground; for, the master had not offered to carry forward the goods, nor could have done so without hiring another ship, for which he must have paid more than the amount of his full freight. Still it may be questionable whether acceptance alone shall in all cases, and as a general rule, be sufficient to raise such an implication, especially if the rateable computation is to be made according to distance or time." Here no beneficial service has been performed under the charterparty. It is absurd to say that the goods were taken on board under an implied contract founded

on meritorious service, where the rights and liabilities of the parties are defined by the express stipulations of a charterparty. [*Tindal*, C. J.—Would not that argument tend to the exclusion of the demand of freight pro ratâ itineris in any case? An express contract is supposed to exist in every case, the performance of which is accidentally intercepted. The goods arriving mid-way, it being impossible to convey them further, the express contract is by the mutual assent of the parties at an end, and the implied contract arises. *Park*, J., referred to *Abbott*, 303—“The apportionment of freight usually happens when the ship, by reason of any disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage. In this case, the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight; but, if he is unable, or if he declines to do this, and the goods are there received by the merchant, the general rule of the antient maritime law is, that freight shall be paid according to the proportion of the voyage performed, pro ratâ itineris peracti (a).”] That passage refers to the rule of the maritime law that prevails in the absence of specific stipulations. Convention overcomes the law. The true question is, have the goods here been received by the merchants upon any contract to pay anterior freight. The merchants had a right to take their goods, the master having abandoned them. Upon this subject, *Abbott* (p. 320) says: “Upon a review of the cases, it will appear, that, considering the subject with regard to the proceedings in the courts of common law of England, the right to freight pro ratâ itineris must arise

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(a) “The Ordinance of Rotterdam differs in this respect from the general rule; for, it allows the merchant to take his goods, paying a reasonable portion of

the freight, in case the ship may be repaired in a short time. Art. 147, 2 *Magens*, 104.” Note in *Abbott on Shipping*, 303.

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out of some new contract between the master and the merchant, either expressly made by them, or to be inferred from their conduct. The right cannot possibly exist when the original contract has been performed, for then the master has another and more beneficial claim. Where an inference is to be drawn from the conduct of the parties, the rule of the maritime law will probably have great weight. But, admitting this, still its true import and meaning may be questionable." The learned author then proceeds to observe upon the cases, amongst others, that of *Luke v. Lyde*, of which he seems not entirely to approve. In *Hotham v. The East India Company*, 1 T. R. 638, the freight was payable by the ton, and the vessel ultimately arrived at her destination.

Shee, in reply.—The contract here was, not so much for the hire of the ship as for the carriage of the goods—not *locatio navis et magistri*, but *locatio operis transvehendarum mercium*. In *Cook v. Jennings*, the condition of the payment of the stipulated freight was the *arrival of the ship*. Here, the goods were consigned to Gibraltar, therefore the *Flora* was properly hired merely to convey them thither. It was the duty of the captain, when he found himself at Fayal unable to proceed in the *Jane* to her destined port, to forward the cargo in the best practicable manner to Gibraltar; and, having done so, the full freight was payable. He, acting as the agent of the freighters, as well as of the ship owner, caused the goods to be forwarded. At all events, the plaintiff is entitled to freight *pro ratâ itineris*. There could be no difficulty in the apportionment. *Bright v. Cowper* and *Cook v. Jennings* are not adopted by Lord Chief Justice Abbott as authorities; and his views on the subject are confirmed by the learned American Commentator already referred to. The acceptance by the defendants' consignees of a portion of the goods at Gibraltar, operated as a dispensation

with the exact performance of the entire contract; and consequently the plaintiff is entitled, if not to the full freight, at least to a reasonable freight for the portion of the voyage the vessel performed, to be calculated with reference to the original contract (*b*).

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Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:— In this case two questions arise—first, whether the plaintiff is entitled to recover the full freight agreed to be paid by the charterparty—secondly, if not entitled to recover the full freight, whether he is entitled to recover any and what freight pro rata itineris.

1. In order to entitle the plaintiff to recover the full freight, he must establish that he has performed the voyage prescribed by the charterparty. The first part of the voyage was duly performed by the arrival of the ship at Buenos Ayres: and a destination for the accomplishment of the homeward voyage was given by the freighters there, who appointed Gibraltar as the port of discharge. But the plaintiff never performed that homeward voyage either in the ship mentioned in the charterparty or in any other. The original ship and about one third of the cargo having been lost by perils of the seas, the remainder of the cargo was left at the Island of Fayal by the master, who on the 12th July sailed in another vessel for England, having left instructions with the vice-consul at Fayal to forward the remainder of the cargo (about two thirds) by the earliest opportunity to Gibraltar. The master having been wrecked on the next day, returned to Fayal, and remained there till the 24th July, when he again sailed for England, having on the 23rd addressed a letter to the vice-consul, stating his having been informed of the expected arrival of a vessel originally destined for Newfoundland, and re-

First point —
 As to the plaintiff's claim for the full freight.

(*b*) See *Jesse v. Roy*, 1 C. M. & R. 316.

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commending the vice-consul, if he could not obtain a reduction of 400*l.* for the freight, to give that sum for the conveyance of the remainder of the cargo to Gibraltar, rather than an opportunity of sending the cargo forward should be lost. No authority appears to have been given to the vice-consul to make any contract for the hire of a vessel on account of the owner of the *Jane*. The master certainly did not make any, nor did he personally make provision for the conveyance of the remainder of the cargo to its destination, much less superintend its transshipment or accompany it to the port of discharge. Before his departure from Fayal, no vessel of sufficient capacity to convey it had arrived at Fayal; but, on the 29th July, such a vessel having arrived, the vice-consul chartered that vessel on behalf of the owners of the cargo of the *Jane* at a freight of 360*l.* for the conveyance of the goods to Gibraltar. Under this charterparty the vessel so hired by the vice-consul on behalf of the owners of the cargo sailed to Gibraltar, and delivered it to their agents, who received it, and paid freight and charges, 378*l.* Under these circumstances, it appears to us that the goods which were so left by the master of the *Jane* at Fayal, having been forwarded to Gibraltar by the vice-consul, acting in the name and on behalf of the owners of the cargo, and at their expense, cannot be said to have been carried to their destination by the owner of the *Jane* in fulfilment of the charterparty entered into with the defendants, and consequently that the freight stipulated to be paid by the charterparty has not been earned.

Second point—
Freight pro
rata itinervis.

2. The next question is, whether anything in the nature of freight is recoverable by the plaintiff upon a new and implied contract founded on meritorious service rendered by him to the defendants in the partial performance of the voyage contemplated, and the acceptance of the goods by the latter under the circumstances stated in the case. The carriage of the goods from Fayal to Gibraltar not having

been the act of the plaintiff, we are of opinion that no claim to freight can be made by the plaintiff for that portion of the voyage. And we are also of opinion that the plaintiff has no right to claim any freight *pro ratâ itineris* for the outward voyage from England to Buenos Ayres. The freight for the entire voyage was a gross sum of 1800*l.*; of which 200*l.* was to be paid in England, cash for the necessary expenses of the vessel in the river Plata, and the residue at Gibraltar at the current exchange upon London. If the vessel had arrived at Buenos Ayres, and had been lost immediately afterwards, we think that nothing beyond the 200*l.* paid in London could have been claimed: but, as she actually brought from Buenos Ayres to Fayal, on her way to Gibraltar, a considerable portion of the cargo put on board at Buenos Ayres, which portion has come to the hands of the freighters and been accepted by them, the question arises, whether the ship-owner has not a claim to freight *pro ratâ itineris* for the conveyance of that portion of the goods from Buenos Ayres to Fayal. And, upon the best consideration which we can give to the case, we think he has such claim.

We have already said that the goods were forwarded by the vice-consul, acting as the agent of the freighters: but the vice-consul was desired by the master of the *Jane* to forward them, though not desired to forward them on behalf of the ship-owner. The agents of the freighters at Gibraltar have accepted the goods, paid the freight, and thereby recognised the act of the vice-consul as their agent. The case, therefore, must stand in the same position as if the freighters had accepted the goods of the master of the *Jane* at Fayal, and conveyed them on their own account to Gibraltar; in which case we think that they would be liable to pay freight for that portion of the voyage performed in respect of the goods accepted. At what rate the freight is to be calculated is the remaining question to be considered. And we are of opinion that the ship-

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owner under the circumstances of this case cannot claim any remuneration beyond a reasonable freight from Buenos Ayres to Fayal, the amount of which the arbitrator will determine. The freight agreed upon by the charter was not of an ordinary kind, but a gross sum to be paid in case of the performance of an extraordinary voyage. That voyage has not been accomplished. The voyage was not in its nature divisible, so as to give to the ship-owner a claim to any aliquot part upon the performance of a certain portion of the voyage. The claim of the ship-owner must therefore rest upon an implied contract to remunerate him for service performed, not according to the agreement, but a service from which the freighters have received a benefit. And whether upon the whole the ship-owner has been overpaid or not, will appear when the account is taken by the arbitrator on this principle between the parties. The verdict, therefore, in this case will stand for such sum as the arbitrator finds remaining due to the plaintiff.

Rule accordingly.

Friday,
Jan. 29th.

In an action for a vexatious and excessive distress, the plaintiff cannot recover by way of damages the extra costs necessarily incurred by him in a former action of replevin.

GRACE v. MORGAN.

CASE for an excessive distress. At the trial before Littledale J., at the last Assizes for the county of Surrey, a verdict was found for the plaintiff, damages 20*l.* 12*s.*

Hughes, in Michaelmas Term, obtained a rule nisi to increase the damages by 23*l.*, the amount of the extra costs in a former action of replevin which the plaintiff had brought in respect of his goods distrained, and in which the proceedings had been stayed by consent, and the amount of the taxed costs had been received by the plaintiff from the defendant before the present action was commenced. He cited *Sandback v. Thomas*, 1 Stark. 306, and *Smith v. Compton*, 3 B. & Ad. 407.

Wallinger shewed cause.—The plaintiff can claim as damages nothing beyond the taxed costs—*Sinclair v. Eldred*, 4 Taunt. 7; *Webber v. Nicholas*, 1 R. & M. 419. So in *Jenkins v. Biddulph*, 4 Bing. 160, 12 Moore, 390, it was held, that, in an action against the sheriff for a false return of non est inventus, per quod the plaintiff was outlawed, the plaintiff could not recover the extra costs of the outlawry. And in *Hodges v. The Earl of Litchfield*, ante, Vol. 1, p. 450, 1 New Cases, 492, on a bill filed by vendor against purchaser, for not accepting the title, the bill having been dismissed with costs, it was held that the purchaser could not afterwards recover the extra costs of the equity suit, in an action for damages sustained by him in consequence of the non-completion of the title. *Bosanquet, J.*, there asks—"Are not costs beyond taxed costs to be considered as incurred voluntarily, beyond what is absolutely necessary?" And *Park, J.*, says: "If the claim be allowed in this case, I do not see why, in all cases, a separate action should not be brought for costs which the officer of the court disallows on taxation." *Sandback v. Thomas* is the only case the other way.

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Platt and Hughes, in support of the rule.—The plaintiff is entitled to recover the extra costs which were necessarily incurred by him in consequence of the wrongful act of the defendant. Where one does a wrong to another, the law obliges him to compensate the injured party to such an extent as will fairly indemnify him. *Nowell v. Roake*, 1 M. & R. 170, 7 B. & C. 404, is expressly in point. There it was held, that, in an action of trespass for entry, expulsion, and mesne profits, the plaintiff may recover the costs of the reversal of a judgment in ejectment for the defendant, as between attorney and client. Lord Tenterden said that the jury might reasonably consider the costs between attorney and client as the measure of the damages which he had sustained. In *Sand-*

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back v. Thomas, 1 Stark. 306, it was ruled, that, in the calculation of damages in an action for maliciously holding the plaintiff to bail, the plaintiff is entitled to recover, not merely the taxed costs, but the costs as between attorney and client: and Lord Ellenborough says: "If by your act you subject a party to a legal liability to pay a sum to another, you must indemnify him against such expenses; if it were otherwise, it would come to this, that an attorney could not maintain an action against his client for the extra costs." In *Hodges v. The Earl of Litchfield*, the costs sought to be recovered had been unnecessarily incurred. The decision in *Sandback v. Thomas* was approved by Best, C. J., in *Webber v. Nicholas*, R. & M. 419. And in *Smith v. Compton*, 3 B. & Ad. 407, the defendant conveyed premises to the plaintiff and covenanted for good title; an action of formedon was afterwards brought against the plaintiff by a party having better title, and the plaintiff compromised it for a sum of money: it was held that the plaintiff, in an action for the breach of covenant, might recover the whole sum so paid, and his costs as between attorney and client in the compromised suit, though he had given no notice of that suit to the defendant. Lord Tenterden said: "As to the costs, the plaintiff here had a right to claim an indemnity, and he is not indemnified unless he receives the amount of the costs paid by him to his own attorney." In *Sinclair v. Eldred*, the plaintiff failed on the ground that he did not prove express malice. Here, the extra costs were confessedly occasioned by the wrongful and malicious act of the defendant.

Cur. adv. vult.

TINDAL, C. J., delivered the judgment of the court:—This was an action on the case brought against the defendant for a vexatious and excessive distress; and the only point argued before us has been, whether the plaintiff should be at liberty to add to the damages given by

the jury the amount of the extra costs in a former action of replevin which the plaintiff had brought in respect of his goods distrained, and in which the proceedings had been stayed by consent, and the amount of the taxed costs had been received by the plaintiff from the defendant before the present action was commenced. It has been argued, that, upon general principle, the plaintiff is entitled to a complete indemnification for all the necessary and immediate consequences of the wrongful and vexatious act of the defendant; and that it is impossible to say that he receives such indemnity, if he is obliged to bear the loss of those costs which were necessarily expended by him in prosecuting that suit, but which have not been allowed as between himself and the adverse party by the taxing officer. But, whatever might have been our opinion if the matter were *res integra*, we feel ourselves bound by the decision of this court in the case of *Jenkins v. Biddulph*. In that case, which was an action against the sheriff for a false return of *non est inventus*, in consequence of which the plaintiffs were outlawed, this court held that they were not entitled to recover the extra costs of the outlawry; and the taxed costs of the outlawry having been paid before the action was brought, a nonsuit was directed to be entered. It may be observed that all the cases relied on by the plaintiff as authority that the full costs of the former action are recoverable in a subsequent suit for vexatiously prosecuting the former action, are cases where there has been no taxation of costs in the former action, such as ejectment, where the judgment was obtained by default against the casual ejector; or formedon, where there are no costs given in the action itself; or upon a writ of error, where no costs are given: in which cases the plaintiff must recover his full expenses, if he is entitled to recover any. But, in ejectment, where the action has been defended, and the costs taxed, he is not allowed to recover the extra costs in a subsequent action—*Doe v. Davis*, 1 Esp.

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358. There is only one case that has been cited in opposition to the principle above laid down, viz. that of *Said v. back v. Thomas*: but, whatever respect is due to the opinion of the very eminent judge who tried the cause, we cannot think it sufficient to outweigh the authorities to which we have referred.

Rule discharged.

HOLLINGWORTH v. BRIGGS.

Friday,
Jan. 29th.

The court allowed the defendant to amend his pleadings after one of the plaintiff's witnesses had been examined and cross-examined under a judge's order—it appearing that, prior to the examination, the plaintiff's attorney was apprised of the proposed amendments, and the witness was examined with reference thereto.

THIS was an action brought to recover a sum of 800*l.*, being the amount of the defendant's subscription to a policy of assurance on freight, dated the 14th October, 1824, effected upon the ship *Angerstein*, lost or not lost, at and from Valparaiso and her ports of loading on the west coast of South America to London. On the 18th November last, the defendant (under a judge's order) pleaded to the following effect—First, to the first count, and so much of the last count as related to all the sums of 20*l.* therein alleged to have been received by the defendant for the use of the plaintiff, except 5*l.* 6*s.* parcel thereof, and to the account therein alleged to have been stated between the plaintiff and defendant, that the defendant did not promise—Secondly, to the first count, that the vessel was unseaworthy, and not worth repairing—Thirdly, that the goods loaded on board the vessel (being copper and saltpetre) were an unfit and improper cargo for the vessel, and more than she could reasonably stow and carry; and that the loss was occasioned by the unfitness of the cargo, and overweighting, and not by the perils of the seas unconnected with and independent of such unfitness and overweight—Fourthly, that the plaintiff was not interested in the subject matter of insurance—Fifthly, that the vessel insured sailed from Valparaiso on her intended voyage, and afterwards arrived at her ports of loading in the policy mentioned; that, at the said last-mentioned ports, divers

goods and merchandizes were loaded on board the vessel, to be carried and conveyed therein on the voyage mentioned in the policy; that the same were so improperly laden and stowed on board that the vessel was rendered and remained and continued from thenceforth until and at the time of the loss unfit for the voyage and wholly unseaworthy—Sixthly, that the plaintiff was not deprived of the freight by any bilging, breaking, or injury of or to the said vessel by or through the dangers or perils of the seas and the force and violence of the winds and waves, as in the declaration alleged—Seventhly, to the last count, as to 6*l.* 6*s.*, payment of that sum into court.

Issue was joined on the 17th December last; and, on the 22nd, a judge's order was obtained for the examination before one of the prothonotaries of John Bouch (the captain of the *Angerstein*), who was about to proceed to Calcutta. Bouch was accordingly, on the 30th, examined and cross-examined. After the order for the examination of Bouch was made, the defendant obtained a summons for leave to amend his pleas, which summons was served, and the proposed amendments handed over to the plaintiff's agent a few minutes prior to the commencement of the examination of Bouch, and after he had been sworn; and it was sworn on the part of the defendant, and not denied, that the witness was examined and cross-examined with reference to such amendments.

In addition to the pleas above set forth, the defendant had originally proposed to plead other three, which the judge refused to allow. One of the last-mentioned pleas was to the following effect—"That the vessel, before and at the time she sailed on the voyage, and from thenceforth until and at the time of the loss, was the property of the plaintiff, and he was the owner thereof: that, after she sailed on the voyage named, and during the same, and before the loss, she was damaged and injured; but that such damage and injury might have been repaired and made

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good with reasonable care and diligence and at a small expense as compared with the value of the vessel; that such repairs were neglected and omitted to be made and that, if such repairs had been made and done on the basis would not have happened. Now I found the testimony of the

R. V. Richards, on the part of the defendant, obtained a rule nisi to amend the second plea by striking out the words "and not worth repairing," and the third by some slight verbal alterations; and also to add an plea to the following effect:—That, after the vessel was bilged, broken, damaged, and injured, and the first cargo mentioned was put in and arrived at Valparaiso; that the said injured vessel might and could have been repaired, and made good as to have enabled her to complete the voyage with her cargo on board as aforesaid, that reasonable and reasonable diligence been used by the plaintiff and his agents in the affidavit in support of the motion (in addition to the facts above detailed) stated that the evidence of Bouch (taken before the prothonotary) was very materially at variance with the survey of the *Angarstein*, alleged to have been made by the port surveyor and others at Valparaiso on the 26th September, 1884; that it was intended to apply on behalf of the defendant for a commission to examine witnesses at Valparaiso; that the *Angarstein* was sold by Bouch at Valparaiso in October, 1884, on the ground that she was not worth repairing, and it appeared by his examination, that, when he left Valparaiso in the early part of the November following, the vessel was taking in cargo, and was about to proceed on a voyage to San Carlos, in Chile.

Maule shewed cause.—Regard being had to the stage in which the proposed amendments are sought, it is manifest that great inconvenience to the plaintiff and great injustice must inevitably result from allowing them.

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material portions of the plaintiff's case has already been admitted, and to which the evidence stands in an unchangeable form; and the defendant by his amendments seeks to introduce something arising out of that evidence. Suppose the testimony of Bouch were false, inasmuch as it was given in reference to a totally different record, it would be impossible to indict him for perjury. *Richardson*, in support of his rule. — Before the new rules in pleading, any of the defences here set up might have been given in evidence under the general issue. But now, the defence being required to be put upon the record, the defendant will have no means of meeting the plaintiff's case unless the suggested amendments are allowed; and it would be most inconvenient and mischievous to lay it down as a general rule that no amendment can be under any circumstances allowed where a witness has been examined under an order of the court or a judge.

THOMAS, C. J. — The first amendment proposed will not in any degree alter the situation of the plaintiff, and therefore it may be allowed. With respect to the others, the question seems to me to turn on the degree of notice of the intended application to amend given to the plaintiff before the examination of the witness Bouch. From the affidavits it appears to me that such reasonable notice was given. The plaintiff knowing that amendments would be applied for, might either have cross-examined Bouch with reference to the amended issues, or he might have suspended the examination until those issues had been put in proper form. Without, therefore, laying down any general rule, I think under the circumstances the amendments may be allowed.

BARRIS, J. — I am of the same opinion. A judge at chambers would have allowed these amendments before the

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examination of Bouch. And it appears that notice was given to the plaintiff's attorney before his examination was actually commenced that the amendments would be applied for; and it is sworn, and not denied, that the examination and cross-examination proceeded with reference to the contemplated amendments. Under these circumstances, I think justice requires that the rule should be made absolute.

GASELER, J.—I am of the same opinion: but at the same time I must observe that I think amendments of this sort ought to be watched with considerable care and caution.

BOSANQUET, J., concurred.

Rule absolute, on payment of costs.

Friday,
Jan. 29th.

In a *capias* into London, the direction to return the writ was addressed to "the said sheriff:"—Held, no ground for setting aside the writ.

An affidavit of debt in an action against the drawer of a bill of exchange stated that the bill was *undue* and unpaid, and *disclosed no default of the acceptor*:—Held, sufficient. *Sed quare* (a).

IRVING and Another v. EATON.

THE defendant was held to bail upon an affirmation which stated that he was indebted to the plaintiffs in the sum of 50*l.*, as indorsees of a bill of exchange drawn by the defendant on and accepted by James Caldwell for the payment of 50*l.* to the order of the defendant at a day now past, and by the defendant indorsed to the plaintiffs, "and which said bill is wholly *undue* and unpaid." The writ of

(a) The decision in this case as to the allegation in the affidavit of the default of the acceptor, and the case of *Weedon v. Medley*, 2 Dowl. 689, to the same point, were expressly overruled by the court of Exchequer in *Crosby v. Clarke*, 1 M. & W. 296, where the court (in affirmance of the rule

laid down in *Buckworth v. Lewis*, 5 M. & P. 23, 7 Bing, 251, 1 Dowl. 211, *Cross v. Morgan*, 1 Dowl. 122, and *Banting v. Jadis*, 1 Dowl. 445) held that an affidavit of debt in an action by the indorsee against the drawer or indorser of a bill of exchange, must shew a default by the acceptor.

capias was addressed to the sheriffs of London; but the direction to return it ran thus:—"And we do further command you, *the said sheriff*," &c.

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John Jervis moved that the bail-bond might be delivered up to be cancelled, on the ground that it did not appear from the above affirmation either that the bill was due or that the acceptor had made default. He also objected that the writ of *capias* was defective, the direction to return the writ being addressed to a non-existing officer—*Nicoll v. Bayne*, 3 M. & Scott, 812, 10 Bing. 339; *Barker v. Weedon*, 2 Dowl. 707.

PER CURIAM.—The affirmation states the defendant to be *indebted* to the plaintiff, which he could not be unless the bill were overdue and the acceptor had made default. As to the writ, if the words "the said sheriff" are rejected, the objection is removed.

Rule refused.

WILLIAMS v. PLUMRIDGE.

Friday,
Jan. 29th.

TROVER for chalk, lime, and soil. Pleas—1. not guilty—2. that the plaintiff was not lawfully possessed as of his own property of the said goods and chattels in the declaration mentioned. Issue thereon.

In trover for chalk dug by the defendant from the waste of the plaintiff's manor and converted by the defendant into lime, it appeared that the plaintiff's writ had demanded payment for the chalk, but whether as rent or not the evidence was conflicting. The judge not having left it

The cause was tried before Bolland, B., at the last Assizes for the county of Bucks. It appeared that the plaintiff was lessee of the manor of Fingest, in the county of Bucks; that the father of the defendant, about forty-eight years ago, opened a pit on part of the waste of the manor, and continued to the time of his death, which happened about sixteen years since, to dig chalk there-

to the jury to say whether or not the defendant held the land at a rent—The court directed a new trial.

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from and convert the same into lime; that the defendant, from the death of his father down to a short time before the commencement of this action, did the like; that no acknowledgment had ever been paid to the former lords of the manor for chalk so dug; and that, in May, 1835, the bailiff of the manor applied on behalf of the plaintiff for payment for the chalk, when the defendant replied that he had no money, and must go to gaol to pay it: and that, on another occasion, when a similar demand was made, the defendant gave the same answer, but at the same time desired to be furnished with an account; and that, an account being handed to him, charging him for the chalk at the rate of 5s. per annum, he disputed the plaintiff's right to demand it, and refused to pay anything. There was conflicting evidence as to whether the above sum was demanded as a payment for the chalk, or as rent eo nomine. For the defendant, it was contended that the plaintiff could not, whether the demand was for rent, which would be an acknowledgment of a tenancy, or for payment of the chalk, which was treating the defendant as a contractor; afterwards charge him as a tortfeasor. The learned judge said that the claim of right set up by the defendant, not having been specially pleaded, could not be given in evidence; and that the only questions for the jury were, first, whether the defendant had been guilty of a conversion, which he observed was clearly proved, and secondly, whether the chalk was the plaintiff's property, which the lease proved. A verdict having been found for the plaintiff—

Storks, Serjeant, in Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection.

Gunning and *Dasent* shewed cause.—They submitted that, if there ever was a tenancy, there was sufficient evidence of a disclaimer, the defendant at the trial setting

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up a claim of right arising out of a long uninterrupted possession: and they relied on *Thompson v. Shirley*, 1 Esp. 31, where it was held that a demand of payment for goods for which an action of trover is brought is a good demand to support the action; and *Burr v. Morris*, 4 Tyr. 485, where it was held that the acceptance of part does not affirm the taking so as to waive the tort, but the amount received will go in mitigation of damages.

Storks, Serjeant, in support of his rule.—The money demanded was for rent *eo nomine*. There was nothing on the evidence to shew that the defendant was a tortfeasor. [*Tindal, C. J.*—The question whether the money was demanded for rent or as a payment for the chalk, was never put to the jury.] The objection was overruled by the learned judge, on the ground that the defendant had not set up a claim of right by a plea properly framed for that purpose.

TINDAL, C. J.—It certainly does appear that the true question in the cause has not been presented to the jury: whether the defendant held the land at a rent or not. A disclaimer of the plaintiff's title at the time of the demand, would undoubtedly remit the plaintiff to his right to bring trespass or trover. But the evidence discloses nothing approaching to a disclaimer: it amounts to no more than a refusal to pay, on the score of poverty. The claim of right attempted to be set up at the trial seems a little more like a disclaimer: but that was made at a period too late to bind the rights of the parties. The cause must go down again; the costs of the first trial will abide the event of the second.

The rest of the court concurring—

Rule absolute accordingly.

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The sheriff is
entitled to
costs under
the interpleader
act only under
very special
circumstances.

WEST v. ROTHERHAM.

THE plaintiff levied an execution on the defendant's goods. The latter was afterwards declared a bankrupt, and, the goods being claimed by his assignees, the sheriff obtained a rule under the interpleader act, 1 & 2 Will. 4, c. 58. An issue was directed for the purpose of ascertaining the right to the proceeds, which were brought into court. At the trial an arrangement was entered into, under which the plaintiff agreed upon certain terms to abandon the execution. On a motion on the part of the assignees that the money might be paid out of court to them in pursuance of this arrangement—

Wilde, Serjeant, for the sheriff, prayed that he might be allowed the costs of his application, in accordance with the practice that prevailed on the subject of interpleading motions in the courts of equity before the passing of the late act.

TINDAL, C. J.—It is true that the sheriff was usually allowed his costs in equity: but I think the statute gives him so great a boon, at so comparatively trifling an expense, that he ought not to have his costs, unless under very special circumstances.

Costs refused (a).

(a) See *Barker v. Dynes*, 1 Dowl. Vol. 1, p. 325; *Thompson v. Shedden*, 169; *Dubbs v. Humphries*, ante, don, ante, Vol. 1, p. 667.

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Saturday,
Jan. 30th.

BROOK v. BRIGGS.

DEBT for use and occupation. Plea, that the defendant was never indebted. The cause was tried before the undersheriff of Middlesex. The evidence was as follows:—The defendant was let into possession of the premises in question in the early part of the year 1835, under the Rock Reversionary Society. On the 21st May, an agreement was entered into between Perring, Barnard, and Gaitskell (who acted in the capacity of trustees for the society), and the plaintiff, whereby the former agreed to grant to the latter a lease of certain premises (including those for the occupation of which this action was brought) for a term of fifty-six years wanting fifteen days, from Lady Day then last, at the yearly rent of 300*l*. The plaintiff was put into possession under this agreement, and received from the defendant the quarter's rent due at Midsummer Day, under a threat of a distress: and there was evidence of repairs having been done by the plaintiff at the request of the defendant. The agreement of the 21st May was never in fact carried into effect, and the quarter's rent due at Michaelmas (the subject matter of this action) was paid by the defendant to the agent of Perring, Barnard, and Gaitskell.

The defendant was let into possession of premises under J. S. and paid rent. J. S. afterwards entered into an agreement to grant a lease of the premises to B., who received from the defendant a quarter's rent: the agreement being rescinded:—Held, that the defendant was at liberty to shew that fact in answer to an action for use and occupation at the suit of B.

On the part of the defendant, it was contended that there was nothing in these facts to estop him from shewing the nature of his tenancy—*Rogers v. Pitcher*, 6 Taunt. 202, 1 Marsh. 541; *Carvick v. Blagrove*, 4 Moore, 303, 1 B. & B. 531; *Gravenor v. Woodhouse*, 7 Moore, 289, 1 Bing. 38; *Cornish v. Searell*, 8 B. & C. 471: and that the agreement of the 21st May, not being under seal, conferred upon the plaintiff no legal interest in the premises—*Shep. Touch.* 230.

A verdict having been taken for the plaintiff—

S. Martin, pursuant to leave reserved, on a former day

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BLOOD

obtained a rule nisi to enter a non-suit, on the grounds urged at the trial.

Tindal, Sergeant, showed cause.—It is not necessary to consider how far the authorities cited bear upon the particular facts of this case; and it may be conceded, that at the time the rent which is the subject of this action became due, the legal estate in the premises was not in the plaintiff; but the question simply is whether or not, under the circumstances, her debt for use and occupation is maintainable by her. The agreement of the 21st May placed the plaintiff in the position at least of a tenant from year to year under Perring, Barnard, and Gaitskell: and the defendant, by paying her agent the rent due at Midsummer, admitted her to be in an equitable relation entitled to the rent. To enable her to sue she needed not a strict legal title. [Tindal, C. J.—Take the common case of a mortgagor; he may maintain an action for use and occupation, though the legal estate is in another.] In *Hall v. Hughes*, 6 Price, 157, where the owner of an estate contracted to sell it to another, who thereupon sold part of the property so contracted for, by auction, to a third person, and the sub-vendee obtained possession, and the original vendor afterwards refused to perform his contract, on which a suit in equity was brought, pending which the original vendor obtained possession from the sub-vendee, on a demand to be restored to it, it being rumoured that the original purchaser had failed in the suit instituted for specific performance; the plaintiff ultimately succeeding in the suit, and the estate being in consequence conveyed to the purchaser under a decree of the court of Chancery, it was held that the sub-vendee might maintain an action for use and occupation against the original vendee for all the time during which he held the possession so obtained from the second purchaser. [Tindal, C. J.—There, no person other than the plaintiff

could have maintained an action for the use and occupation: here Perring, Barnard, and Gaitskell, the parties under whom the defendant entered, might have done so, on the negotiation between them and the present plaintiff going off. It must be conceded that the agreement between Perring, Barnard, and Gaitskell, and the plaintiff, conferred upon the latter no present interest: but the question is whether the fact of the payment of rent by the defendant to the plaintiff does not amount to such an admission that the defendant occupied, and that the plaintiff permitted him to occupy the premises, as to entitle the plaintiff to maintain this action.

Martin, in support of his rule, was stopped by the court.

THE CHIEF JUSTICE. It appears to me that the rule that has been obtained for entering a nonsuit in this case must be made absolute. The situation of the parties is this: Perring, Barnard, and Gaitskell are the owners of the property; they are trustees having the legal estate. The defendant entered under them, and paid rent. The plaintiff afterwards entered into an agreement with Perring, Barnard, and Gaitskell, for a lease of the premises, (amongst others), which agreement it was expressly stipulated should not operate as a lease. Nothing, therefore, passed to the plaintiff under this agreement, but an equitable right to have a lease upon certain conditions on her part being previously performed. The plaintiff was permitted to receive a quarter's rent from the defendant; and afterwards this conditional agreement was rescinded: consequently the parties were remitted to their original rights. And, although the payment of the quarter's rent to the plaintiff would be, as between the defendant and Perring, Barnard, and Gaitskell, a valid payment, it by no means follows that, when the equitable estate of the plaintiff was put an end to, the right of the original legal

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owners would not revive. I am unable to distinguish this case in principle from that of *Waddilove v. Barnett*, ante, 763, where we held that a tenant may discharge himself by proof of payment of rent to a mortgagee after notice of the mortgage; and that notwithstanding the mortgage was in existence before his tenancy under the mortgagor commenced.

The rest of the court concurring—

Rule absolute.

Saturday,
Jan. 30th.

This court has no authority to set aside a writ of right: nor can it take cognizance of any of the proceedings under it until the original writ has been returned.

Foot, Demandant, Squares, Deforciant.

THIS was a writ of right. The writ was tested the 30th May, 1835, and originally made returnable, and the deforciant summoned to appear on the 2nd November. The summons was dated and served on the 24th October. On the 31st October, a second summons was served upon him requiring him to appear on the 21st November, accompanied with a notice that the return had been altered and the original writ resealed, and also a notice not to appear pursuant to the summons first served. The writ had not been returned.

Talfourd, Serjeant, on a former day in this term, on the part of the deforciant, obtained a rule nisi for setting aside the writ of right, and the summons thereon, for irregularity. He submitted that the alteration and resealed of the writ were altogether irregular after a step had been taken thereon; and he distinguished this from the case of *Miller*, dem., *Miller*, ten., ante, p. 116, 2 New Cases, 66, inasmuch as there the error was the act of the officer of the court, who had inadvertently made the writ of summons returnable on a dies non; and nothing had been done upon it.

Wilde, Serjeant, and *W. H. Watson*, shewed cause, upon affidavits stating that the alteration in the return of the writ had been rendered necessary in consequence of the sheriff's having omitted to serve the summons so as to allow a sufficient number of days to intervene between the service and the time of appearance; and that the service of the first summons being thus void, a second had been substituted.—This is not like the case of *Leigh v. Leigh*, ante, 666, 668, for here the alteration and resealing took place within the time allowed by the law for the issuing of writs of right. The court cannot at all events set aside the writ; they have no jurisdiction over a writ issuing out of Chancery; neither can they set aside the summons, which is not the writ of summons, properly so called, spoken of in *Leigh v. Leigh*, but merely the warning or notice given by the sheriff. This court can have nothing to do with the cause until the original writ has been returned. That, which has been done, however, is perfectly regular. There is no rule either in this court or in the court of Chancery to prevent a writ from being altered in its return, and resealed, provided such alteration be consistent with what the writ might have been originally: and it makes no difference that the writ has been served. Where amendments in process are matters almost of course, the courts will not entertain motions to set them aside for irregularity—*Popkins v. Amory* (or *Smith*), 5 M. & P. 319, 7 Bing. 434. Writs of fi. fa. have been amended after a levy (a), and writs of ca. sa. after the defendant has been taken in execution (b); under such circumstan-

(a) See *Davey v. Hollingsworth*, Bl. 636; *Mackie v. Smith*, 4 Tidd, 1037; *Atkinson v. Newton*, 2 B. & P. 336; *Simon v. Gurney*, 1 Marsh. 237, 5 Taunt. 605; *Meyer v. Ring*, 1 H. Bl. 541; *Cowperthwaite v. Owen*, 3 T. R. 657.

(b) See *Hunt v. Kendrick*, 2 W. 577; *Washbrough*, 2 T. R. 737; *Newnham v. Law*, 5 T. R. 577.

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see, undoubtedly, it would not be complete, if this party
to get back the writ, and alter and reseal it, without the
leave of the court; but, with such leave, the amendment
is almost a matter of course. That it is, here, the in-
variable practice of the court's officers, is not to be
doubted, and, in fact, original writs, is beyond doubt, the
alteration, therefore, has the sanction of the authority
from whose jurisdiction the writ emanates. *See* *Reynolds v. Bellingham*, 12 L. J. Rep. 889, where a writ was
for the purpose of bringing the defendant into court in
order to enable the plaintiff to declare against him in an
action of assumpsit, was held not to prevent the plaintiff of
limitations from attaching upon the same for which the sta-
tion was brought, unless the writ were returned. *In* *Cox v. Shaw*, 2 N. J. B. 289, leave was granted to amend by spe-
cial capias, in order that an application might be made to
the Master of the Rolls to procure a new original writ. *In*
Dunlop v. Henson, 2 D. & R. 11, 12 B. & C. 11, it was
held, that, before a writ was returned, it might be altered
as to the return day, and resealed, without being brought
provided no term intervened between the first and the day
on which it was ultimately made returnable. *In* *Leigh v. Leigh*,
the writ was actually upon the files of the court,
and the alteration and resealing took place at a time sub-
sequent to the latest period allowed by the law for the
issuing of writs of right. *In* *Cox v. Murray*, 1 W. B.
462, an amendment of the writ was allowed in a special
action. *See* also *Reynolds v. Bellingham*, 12 L. J. Rep. 889, and
Talbot v. Talbot, 12 L. J. Rep. 889, and *Bliss v. Andrews*, in support of
the rule. The jurisdiction of this court arises when the
writ is returnable. *In* *Jennings v. Lord Howe*, a case that
came before the Vice-Chancellor on motion to amend a

(c) As to amendment in the writs, *see* *Reynolds v. Bellingham*, 12 L. J. Rep. 889, and *Bliss v. Andrews*, in support of the rule. The jurisdiction of this court arises when the writ is returnable. *In* *Jennings v. Lord Howe*, a case that came before the Vice-Chancellor on motion to amend a

writ of right; his Honor doubted whether he could entertain the question after the time for returning the writ had expired. In the case of *The West's Company v. Haynized*, 3 Atk. 362, an action brought on the covenant, in which the plaintiff served the defendant with a copy of a writ instead of a special copy, and afterwards got the plaintiff to alter the return of the original writ was held that the alteration was immaterial, and that the writ must be interpreted as if it were a special copy. It was also held that where errors appeared on the face of the writ, the proper course is, by plea in the court, to set it aside. The Lord Chancellor (Hardwicke) said, "If nothing had been done on this writ, it would have brought into the question concerning its being done by writing it over or done by interlineation, or engraved in which precision it is admitted that, if an original writ has been executed, it cannot be stopped. Now, what is such an execution as to prevent an alteration of it? If it had been lying in the attorney's hands, and so in the party's power, that would be one thing. And if the service of the writ, being void, is to be looked on as no service, a party may always avoid an irregular execution of his own writ, and get it altered. Suppose it had been carried to the sheriff, and he had returned it improper, would that have been an execution? To be sure it would. This has not been carried to the sheriff, yet this copy, though an irregular service, because not warranted by the 12 Geo. 1, is still an execution of the writ; nay, it is actually specified in the copy what the return of this writ is; can he afterwards alter the return?" In *Smith v. Wilmer*, 3 Atk. 595, where the original writ had issued under the seal of the court of Chancery, and was altered and amended, with the leave of the court, by the plaintiff's attorney, and then sealed, and the defendant applied to supersede the writ on account of the erasures made in them after they were re-sealed: it was held, that, as the mistakes were merely literal or verbal, there was no ground to super-

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sede them, especially as the cursitors declared it to be the course of their office, that, when their clerks are guilty of mistakes in making out the original warrant from the præcipe, they direct the plaintiff's attorney to set them right, where the mistakes do not affect the substance of the writ. And Lord Hardwicke said: "If the writs had been altered *after the return was out, and process had issued upon them*, and filed in the court of King's Bench without having them re-sealed, I should not have meddled with them; but it would have been under the cognizance of that court." The case of *Leigh v. Leigh* is not distinguishable in principle from this: it was there held, that the re-sealing was a re-issuing of the writ, and that it was an act the party had no right to do without the leave of the court. Here the writ was resealed in October, which was after the expiration of the time limited by the act (3 & 4 Will. 4, c. 27) for the issuing of writs of right; and therefore obnoxious to every objection that was taken in *Leigh v. Leigh*. [*Park, J.*—There the writ had expired before the re-sealing. The judgment of the court was confined to that state of things.] With respect to amendments, writs of right, it is well known, have always stood upon a different footing from all others. This case does not fall within any of the instances of mistake or misprision which Lord Coke, in *Blackamoore's case*, 8 Rep. 156, says were amendable by the 14 Ed. 3, c. 6, 9 Hen. 5, c. 4, or 8 Hen. 6, c. 12; and it was there resolved "that an original writ was not amendable by the common law in the case of a common person." At all events, this court alone can have authority to set aside the writ of summons.

TINDAL, C. J.—It appears to me that this application may be disposed of upon one short ground, viz. that this court has no jurisdiction in the matter. The writ calls upon the sheriff of Kent to command the deforciant that justly and without delay he render unto the demandant

one message, &c., which the demandant claims to be his right and inheritance, and whereof he complains that the deforciant unjustly deforces him. It then goes on "and unless he shall do so, and if the said demandant shall give you security to prosecute his claim, then summon by good summoners the said deforciant, that he be before our justices at Westminster on Saturday the 21st November, in Michaelmas Term next, to shew &c." It seems to me to be perfectly clear, that, until the writ is returned, this court has no jurisdiction. Blackstone, describing the original writ (3 Bl. Com. 273), says it is "a mandatory letter from the king in parliament, sealed with his great seal, and directed to the sheriff of the county wherein the injury is committed, or supposed so to be, requiring him to command the wrongdoer, or party accused, either to do justice to the complainant, or else to appear in court and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must return or certify to the court of Common Pleas, together with the writ itself, which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause." The return, therefore, is clearly the foundation of all our power over the suit. In Comyns's Digest, *Droit* (C. 3), it is said: "If the tenant does not appear at the return of the summons, nor be essoined, a grand cape issues against him. If he does not appear at the return of the grand cape, judgment final shall be against him." The operation of the writ of grand cape is well known. It seems to me that our jurisdiction fails on two grounds—first, because the writ has not been returned—secondly, because we are called upon to do that which we have no power to do, viz. to set aside an original issuing out of Chancery. In the case of *Leigh v. Leigh*, in the present term, where the application to us was to set aside the service of the writ of summons, the writ had been returned and was in the hands of the

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ante, 666, 668.

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proper officer. In that case, therefore, it became us to look to the condition of the defendant. It appeared that the writ had been altered and served at a time when it could by law have no operation. All we did upon that occasion was, to relieve the tenant from the difficulty he was placed in as to which of two courses he should pursue—appear to the writ, and thus affirm its validity—or run the risk of disappearing and treating the writ as a nullity: and, in effect, when we acceded to the motion, we only gave the demandant an opportunity of going to the court of Chancery. If it turned out there that the writ was valid, he could resume his position. If the present case in principle falls within that of *Leigh v. Leigh*, it is not for us to say what will be the effect of an application to the Great Seal. That is the proper tribunal. All the cases that have been cited with respect to amendments made by the cursitor, appear to have been applications to that court. Applications to supersede the writ must clearly be made not to this court but to the court of Chancery: it is not necessary to cite authorities for this. The substantial part of this motion, viz. to set aside the writ of right, seems to me to be coram non iudice.

With respect to the summons, that is no more than the sheriff might have done by word of mouth: although a summons in writing is usual, it is quite unnecessary: it only operates as a mere warning to the tenant as to what is required of him. That, therefore, is of no consequence: and, unless the writ is set aside, we cannot set aside the summons. The rule must therefore be discharged.

PARK, J.—I agree with my Lord Chief Justice that we have no jurisdiction in this case: there is nothing before us. The authorities quoted by his lordship shew that, until the writ is returned, we have no cognizance of the suit. Another objection to our jurisdiction is, that this court has no power to deal with a writ issuing out of Chancery.

Between the present case and *Leigh v. Leigh* there is a manifest distinction: there the writ had been returned; here, not.

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GASKLEE, J.—The only authority this court possesses in writs of right is derived from the court of Chancery by the return. Until the writ is actually returned, therefore, we have no judicial notice of its existence.

BOSANQUET, J.—I am also of opinion that this court has no jurisdiction. It is to be understood that we give no opinion as to the regularity or irregularity of the writ: we merely say we have nothing to do with it. We do not say that the tenant is compelled to appear.

Rule discharged.

THE Vice-Chancellor afterwards, on motion, superseded the writ on the grounds above taken. On appeal to the Lords Commissioners of the Great Seal, on the ground, amongst others, that the court of Common Pleas alone had jurisdiction in the matter, the decree of the Vice-Chancellor was affirmed. The writ was returned pending the proceedings in Chancery.

Saturday,
May 7th.

The original writ having been superseded in Chancery, this court afterwards set aside the grand cape issued pending the proceedings in equity, but without costs.

B. Andrews, on a former day, on an affidavit of these facts, obtained a rule nisi to set aside the writ of grand cape issued thereon.

Bompas, Serjeant, contra, produced an affidavit stating that the grand cape issued after the motion here and before the application to the Vice-Chancellor, and that the demandant had before the present rule was obtained given the deforciant notice that the grand cape was abandoned. He submitted that the rule must therefore be made absolute without costs.

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B. Andrews, in support of his rule.—The grand cape having issued irregularly, and it being necessary for the deforciant to have it set aside—Com. Dig. Essoin (C)—he is clearly entitled to costs.

TINDAL, C. J.—This is an application in a real action, in which costs are not given. Interlocutory costs, however, are still within the discretion of the court. But I think the party is not entitled to the costs of this motion. He comes here after notice that the proceedings are abandoned, merely for the purpose of clearing his title.

The rest of the court concurring—

Rule absolute, without costs.

Saturday,
Jan. 30th.

A defendant who keeps out of the way a witness material to the plaintiff, and thereby impedes the service of a subpoena, is liable to an attachment.

CLEMENTS v. WILLIAMS.

A RULE nisi was obtained by *Stammers* for an attachment against the defendant for impeding the service of a subpoena, upon affidavits stating that the witness, a young lady aged seventeen, was a material and necessary witness, that she resided with the defendant as a part of his family, and was entirely under his care and control, and that the plaintiff had been compelled to countermand the notice of trial in consequence of his inability to serve her with the subpoena, and shewing various attempts so to do, which had been frustrated by the defendant.

Gurney, contra, submitted that a defendant was not bound to afford facilities to the production of evidence against himself.

Stammers, in support of his rule, was stopped by the court.

TINDAL, C. J.—It appears that the defendant is fencing off the service of the process of the court, and keeping the witness out of the way. This is doubtless an offence against justice, and punishable by attachment. Upon the defendant's undertaking to produce the witness at the trial, and paying the costs of this motion, the rule may be discharged.

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The rest of the court concurring, the rule was upon these terms

Discharged.

SCHULTZ v. ASTLEY.

Friday,
Jan. 29th.

THIS was an action brought by the plaintiff as indorsee against the defendant the acceptor of three bills of exchange for 500*l.* each, two of which were described in the declaration as having been drawn on the 2nd August, 1833, by one P. Clissold, and indorsed to the plaintiff; the third (in one count) as having been drawn by one Thomas Wilson, and indorsed successively by Wilson, Dimsdale, Rucker & Grohte, and Petrie & Chapman to the plaintiff. In the fourth count, the last mentioned bill was described as having been drawn "by one Thomas Wilson Richardson by and in the name of Thomas Wilson:" and in another count it was described as a promissory note

One D., being the holder of several bills of exchange, and being indebted to the plaintiff, and also to R. & G. the plaintiff's agents, addressed to the latter as such agents a letter wherein he proposed to hand over to them certain of these bills on receiving from them bills of lading for a cargo of wheat shipped

on his order and for his account by the plaintiff. R. & G. received two of the bills of exchange, and wrote a letter to D., varying the terms of his proposal, and consenting to receive the bills generally on account, when cashed. The first letter was stamped with a 1*l.* stamp; the second was not stamped:—Held, that the first letter was the only evidence of the contract upon which the bills were delivered to R. & G., and therefore properly stamped.

Quære, whether an agreement consisting of a series of letters, the whole containing less than 1080 words, requires a 1*l.* 15*s.* stamp.

The defendant wrote his name (in the usual form of an acceptance) on blank stamped papers, and delivered them to one H. One C. afterwards put his name to the blanks as drawer and indorser; and they were then filled up by a stranger as bills of exchange for the payment of 500*l.* each:—Held, that the acceptor was estopped from saying that the drawing or indorsing of the bills was irregular.

A bill of exchange was drawn and indorsed T. W., by a person whose real name was T. W. R. There was no evidence to shew that this individual had any intention to pass himself off for a different person of the name of T. W., or of an intention to defraud any person of that name, or any other person:—Held, no ground for treating the bill as a forgery, or for holding the bill void on that account.

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made by the defendant payable to Wilson or bearer. Plea—non assumpsit.

At the trial before Tindal, C. J., at the Sittings at Guildhall after the last Hilary Term, the following facts appeared in evidence:—The acceptances in question, together with several others, were fraudulently obtained from the defendant in blank, payable at Messrs. Praed & Co.'s. Clissold, at the request of one G. P. put his name to two of them, before they were filled up, as drawer and indorser. It did not appear by whom they were afterwards filled up. The third was filled up and signed by one Thomas Wilson Richardson, who put his name thereto as drawer and indorser, omitting his surname. The defendant never received any consideration for either of the bills (a). In order to prove that the plaintiff was a bona fide holder of the bills for a valuable consideration, Grohte was called. The transaction, as collected from his evidence was as follows:—The plaintiff was a merchant residing at Dantzic, in Prussia. Rucker & Grohte were his agents in London. The course of their business was, to transmit to their principals abroad (the plaintiff among others) orders for shipments of corn, the bills of lading and bills of exchange drawn against them being sent to Rucker & Grohte, who, upon the bills of exchange being accepted, handed over the bills of lading to the

(a) On the 16th October, 1833, an indictment against a person named Henry Palmer, on a charge of having received the bills of exchange so fraudulently obtained from the defendant Astley, knowing them to be stolen, came on to be tried at the Sessions House, Clerkenwell: the prisoner was found guilty, and sentenced to fourteen years' transportation.

In reference to the same bills,

an indictment for stealing them was afterwards preferred against the individual who obtained them from the defendant: and at the trial at the Old Bailey, Mr. Justice Littledale, upon the same evidence as that upon which the receiver was convicted, directed an acquittal, holding that the offence charged did not amount to a felony.

purchasers. About the middle of 1833, Dimsdale (with whom Rucker & Grohte also had various dealings on their own account) had purchased of the plaintiff through Rucker & Grohte fifty lasts of wheat which were shipped by a vessel called the *Jessie Eason*. About the end of June, Dimsdale gave his acceptances for the amount of this shipment, and received from Rucker & Grohte the bills of lading: these bills were dated June 17th, 1833, at three months' date, and consequently would arrive at maturity on the 20th August. In July, 1833, a further order on Dimsdale's account for one hundred lasts of wheat was sent by Rucker & Grohte to the plaintiff. On the 25th of that month the plaintiff advised his agents of the shipment of the last-mentioned wheat by the *Argo*, and sent to them the bills of lading and bills of exchange for acceptance on account thereof. In this letter the plaintiff hinted a doubt as to the circumstances and credit of Dimsdale. The letter arrived in London on the 20th July, and the bills of lading of the wheat per the *Argo* on the 9th August, previously to which day several conversations took place between Rucker & Grohte and Dimsdale on the subject of security, without which the former declined to hand over to the latter the bills of lading for the wheat. Ultimately (on the 10th August) Dimsdale agreed, verbally, to place certain bills in the hands of Rucker & Grohte as a security for the *Argo's* cargo; producing two of the bills now in question (one of those purporting to be drawn by Clissold, and that drawn by Wilson), and mentioning the third bill, and two others for 500*l.* each, which he could procure for the like purpose. The result of this discussion was an agreement that the proceeds of these five acceptances should (to the amount of 1000*l.*) be applied to pay certain bills (1049*l.* 8*s.*) drawn by the plaintiff against the *Argo's* cargo at twenty-one days' date, and 500*l.* towards payment of the bills accepted by Dimsdale on account of the *Jessie Eason's* cargo, which would fall

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due on the 20th August; and that, if 1500*l.* were not obtained in this way, then Rucker & Grohte were to return Dimsdale three out of the five acceptances for the purpose of enabling him to provide funds to meet the acceptances falling due on the 20th, and the bills at twenty-one days' date, which he was about to accept. Two letters were then prepared with a view of embodying the terms thus agreed upon: the first, addressed by Dimsdale to Rucker & Grohte, was as follows:—

“ Aug. 10th, 1833.

“ As the amounts for which you are liable on my account, and also that I am indebted to your friend, Mr. E. T. Schultz (the plaintiff), are considerable, and you will not deliver the bills of lading to me of the shipments from Dantzic, without security; I propose to arrange our account on the following basis:—To cover you against an incidental loss on the shipment of flour to Balne, your purchases of clover seed on my account, and the shipment of provisions per the George Canning to Oporto, all of which remain in your hands, and may yield a profit as well as a loss, also to repay you for the flour you have sold me, and the loan of 120*l.*; I consent to leave in your hands the profit due to me, of about 200*l.*, on the provisions per the Four Sisters, a bill for 30*l.* on W. O. Marshall, and two bills on G. P. for 500*l.* and 250*l.*, together amounting to 980*l.* Against the flour &c. per George Canning, I request you to accept my friends', Messrs. J. H. & H. M.'s drafts, for 476*l.*, in which case I will pay my acceptance against the same.

“ On your delivering to me the bills of lading for the wheat per Argo, I will accept your friend Mr. E. T. Schultz's drafts for his honor, and pay into your hands against the said wheat three bills of 500*l.* on F. D. Astley, Esq. (the defendant), and 500*l.* on T. H., with 500*l.* on Stead, on condition that you provide me with 500*l.* against the amount of the Jessie Eason's cargo, and furnish me

with funds to retire your Mr. G.'s brother's (the plaintiff) drafts at twenty-one days, or return me three of the last-named bills of 500*l.* each. In case there should accrue a loss on your risks first named on my account, and the same are not covered by the securities, you may apply the balance of the last-named bills in liquidation of such loss."

Dimsdale not having the third bill upon the defendant, or the bill upon T. H., in his possession at that time, the transaction could not then be completed; but it appeared that on that day (*viz.* the 10th August) two of the bills in question—one drawn by Clissold and the one by Wilson—and also the bill on G. P., were delivered to Rucker & Grohte. The answer of Rucker & Grohte, written at the same time, was as follows:—

"10th August, 1833.

"We have received this day three bills, *viz.* 500*l.* and 500*l.* on F. D. Astley, and 500*l.* on G. P., which when cashed we shall put to your account, and on receipt of another bill for 500*l.* on F. D. Astley, and the acceptance of Mr. H. for 500*l.*, as also the acceptance of Mr. C. P. for a bill for 600*l.* drawn by Mr. E. T. Schultz, of Dantzic, under date the 20th July, or, in the place of the latter, the acceptance of H. C. Stead for 500*l.*, we engage to deliver to you the bills of lading of 50 and 50 lasts wheat per the *Argo*, Captain Hammer, from Dantzic: and we further engage to provide 500*l.* in cash, or to return you the same amount on F. D. Astley to meet part of the bills, amounting to 923*l.*, drawn by E. T. Schultz in Dantzic, and falling due on the 20th instant. The above bills will be subject to our approval. We further shall provide 1000*l.* cash to meet your acceptance of bills for the same amount drawn by Mr. E. T. Schultz in Dantzic, dated July 30th, at twenty-one days, or return you any of the above bills, excepting that on G. P."

On the 12th August, Grohte and Dimsdale again met

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for the purpose of closing the transaction, when a further acceptance of G. P.'s for 500*l.* was agreed to be substituted for the bill on T. H. for the same amount. Grohte then handed over to Dimsdale a bill of lading for one half of the cargo of wheat per the *Argo*, and verbally agreed to make or procure for Dimsdale an advance of money on the bill of lading for the residue of the wheat. In pursuance of this agreement Grohte, on the 16th August, lodged the bill of lading with Messrs. King & Co., who advanced to Grohte 600*l.* thereon; and on the same day Grohte gave Dimsdale a cheque for 150*l.*, and on the following day paid on his account and under his direction 476*l.* 16*s.* 4*d.* to a third person.

The several bills received by Rucker & Grohte from Dimsdale were entered in their bill book as having been received at the following dates:—August 12th, G. P.'s acceptance for 250*l.* and Marshall's for 30*l.*; August 13th, two of the defendant's for 500*l.* each, one purporting to be drawn by Thomas Wilson, the other by Clissold, and 500*l.* on G. P.; August 16th, a third acceptance of the defendant for 500*l.*, drawn by Clissold, 500*l.* on G. P., and 500*l.* on Stead. Between the 10th and the 16th of August a correspondence took place between the defendant and Dimsdale, by which the latter became apprised that the bills had been obtained from the defendant by fraud, and without consideration. On the 16th Rucker & Grohte also had notice of the fraud. On the 17th Dimsdale stopped payment.

The letter of the 10th August, from Dimsdale to Rucker & Grohte was stamped with a 1*l.* stamp; the answer thereto was not stamped: the two letters together contained less than 1080 words.

On the part of the defendant, it was objected that the agreement upon which the bills had been delivered to the plaintiff's agents, Rucker & Grohte, was to be collected, not from Dimsdale's letter only, but from the two letters

taken together, and therefore there should have been a 1*l.* 15*s.* stamp upon one of them, the 1*l.* stamp not being applicable where the agreement is evidenced by a series of letters; and that, if either of the letters taken singly constituted the agreement between the parties, it could not be Dimsdale's, which amounted only to a proposal, but it must be the answer of Rucker & Grohte, which contained the acceptance of Dimsdale's proposal. For the plaintiff, it was insisted that the agreement related to the sale of goods, wares, and merchandizes, and therefore fell within the exception in the stamp act 55 Geo. 3, c. 184, sched. part 1, and was altogether exempted from stamp duty; or that, at all events, the stamp of 1*l.* was sufficient even if the agreement were to be collected from the two letters, both together containing less than 1080 words.

It was further objected, on the part of the defendant, that the bills purporting to be drawn by P. Clissold were void, not being drawn according to the custom of merchants, they having in fact been drawn by a stranger after the names of the drawer, acceptor, and first indorser had been put upon them. And with respect to the bill purporting to be drawn by Thomas Wilson, it being proved that the real name of that individual was Thomas Wilson Richardson, it was contended that the bill was a forgery.

His lordship left it to the jury to say whether or not the plaintiff was a holder of the bills for value, and whether or not he had taken them bona fide and without notice of the fraud. The jury found that the plaintiff had given value for the bills, and that two of them had been received without notice of the fraud, but that they had notice of the fraud on the 16th August, the day on which the third bill was handed over to them. A verdict was thereupon taken for the plaintiff upon one of the bills drawn by Clissold, and upon that drawn by Wilson, and for the defendant upon the other.

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Sir *W. Follett*, in Easter Term last, in pursuance of leave, obtained a rule nisi to enter a nonsuit upon the above grounds; and also for a new trial, on the ground that the verdict was against evidence.

Spankie, Serjeant, *Maule*, and *Greenwood*, shewed cause. The agreement relating to the sale of goods, no stamp at all was necessary—*Heron v. Granger*, 5 Esp. 269; *Curry v. Edensor*, 3 T. R. 524; *Warrington v. Furber*, 8 East, 242, 6 Esp. 89; *Watkins v. Vince*, 2 Stark. 368; *Took v. Manning*, 1 Danson & Lloyd, 35; *Meering v. Duke*, 2 M. & R. 121; *Forsyth v. Jervis*, 1 Stark. 487. In *Smith v. Cator*, 2 B. & A. 778, a stamp was held requisite because the primary object of the agreement did not relate to the sale of goods. Here the agreement was put in for a collateral purpose, viz. to explain a circumstance connected with the plaintiff's possession of the bills. At all events, the 1*l.* stamp was sufficient even supposing the agreement be to be collected from both the letters; that being the stamp required where the agreement contains less than 1080 words. [*Tindal*, C. J.—Unless provided for by the act, one stamp would not suffice: the question is whether it was not intended that there should be only a 1*l.* stamp where an agreement containing less than 1080 words was upon one piece of paper, and 1*l.* 15*s.* where it was written upon two or more pieces.] The stamp is imposed upon the agreement, not upon the mere paper: a liberal construction in favour of the subject is to be given to provisions of this nature. The only case in which the point seems to have arisen is that of *Parkins v. Moravia*, 1 C. & P. 376, where *Littledale, J.*, intimated an opinion that, under circumstances like these, a 1*l.* stamp was sufficient. The point, however, was never ultimately presented for decision. The fact of the bills having been drawn, accepted, and indorsed, before they were filled up, is no objection to their validity—*Russel v. Langstaffe*, 2 Doug.

514; *Collis v. Emmett*, 1 H. Bl. 313; *Freeland v. Stone*, 1 H. Bl. 316, n.; *Gibson v. Minet*, 3 T. R. 481, 1 H. Bl. 569; *Gibson v. Hunter*, 6 Bro. P. C. 235, 2 H. Bl. 187, 288; *Snaith v. Mingay*, 1 M. & S. 87, Bayley on Bills, 65. If the defendant had intended to rely upon the fact of the signature of Thomas Wilson being a forgery, it was incumbent on him to aver and to prove that fact. He was bound to shew that the name was assumed for the purpose of the particular fraud; and to aver that the intent was to defraud a particular person—*Rex v. Eccles*, East's P. C. 268; *Peacock's case*, R. & R. 278; *The King v. Wylie*, Bayley on Bills, 434, n. In *Bennett v. Farnell*, 1 Camp. 130, Lord Ellenborough is reported to have ruled that a bill of exchange made payable to a fictitious person, or his order, is neither in effect payable to the order of the drawer, nor to bearer, but is completely void. In p. 180 c. of the same volume, however, is an explanatory note wherein the reporter says: "In *Bennett v. Farnell*, the doctrine I have supposed to have been held, that 'a bill of exchange made payable to a fictitious person, or his order, is neither in effect payable to the order of the drawer, nor to the bearer,' must be taken with this qualification, 'unless it can be shewn that the circumstance of the payee being a fictitious person was known to the acceptor.' A new trial was refused in this case, because no such evidence had been offered at Nisi Prius. Lord Ellenborough said he conceived himself bound by *Minet v. Gibson* and the other cases upon this subject which had been carried up to the House of Lords (though by no means disposed to give them any extension), and that, if it had appeared that the defendant knew George Abney, the payee, to be a fictitious person, he should have directed the jury to find for the plaintiff." And in *Cooper v. Meyer*, 10 B. & C. 469, 5 M. & R. 387, it was expressly held, that, where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to

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pay to the order of the person who signed as the drawer; and therefore, that an indorsee may bring evidence to shew that the signatures of the supposed drawer to the bill and to the first indorsement are in the same handwriting.

Sir *W. Follett* and *Martin*, in support of the rule.—The terms upon which the plaintiff received the bills are contained in one or more written papers; if they are not duly stamped, the whole foundation of the plaintiff's right to recover on the bills is swept away. The agreement is in fact contained in the letter of *Rucker & Grohte* to *Dimsdale*; that letter, therefore, should have been stamped with a 1*l.* stamp: or, supposing that both the letters together constituted the agreement, the law requires that one of them should be stamped with a 1*l.* 15*s.* stamp. The agreement does not fall within the exception adverted to: it contains a variety of stipulations and conditions, any one of which requiring a stamp, the agreement would not be admissible in evidence without a stamp. The agreement was conditional, and the condition it was admitted was not performed. Where the sale is complete, a collateral agreement afterwards entered into, respecting the delivery of the bills of lading, for instance, would not bring the case within the exception. Where, as here, the two documents are distinct, not referring the one to the other, both must be stamped—*Richards v. Franco*, Chitt. Stamps, 19. There is no authority precisely in point to be found in any of the books. In *Peate v. Dicken*, 1 C. M. & R. 422, it seems to have been assumed that a 1*l.* 15*s.* stamp was necessary in a case like the present.—Undoubtedly an acceptance may be given in blank: but it is equally clear that acceptance does not admit the indorsement; the drawer's indorsement must be proved—*Robinson v. Yarrow*, 7 Taunt. 455, 1 Moore, 150. With regard to the bill purporting to be drawn by *Thomas Wilson*, the plaintiff did not prove, as

he was bound to do, that it was drawn by Richardson bona fide by the name of Wilson. The only evidence was that of a man who never saw him write, but had received notes from him signed Thomas Wilson Richardson, and who thought the drawing and indorsement were in his handwriting. Suppose the plaintiff had produced at the trial an altered bill, would it be incumbent on the defendant to shew it to be a forgery? Certainly not. It is for the plaintiff, who seeks to enforce the bill, to shew the propriety of the alteration—*Henman v. Dickenson*, 2 M. & P. 289, 5 Bing. 183; Bayley on Bills, 117; *Bishop v. Chambre*, M. & M. 116, 8 C. & P. 55; *Johnson v. Marlborough*, 2 Stark. 313. There was no proof whatever of the allegation that Thomas Wilson drew the bill; but merely that a person bearing another name, put that name to the bill. Bills are only transferable by the custom of merchants: and it is perfectly clear that it is not competent to any other than the person to whom such blank acceptance is given to draw the bill. A transfer pre-supposes the existence of the thing upon which it is to operate—*Robinson v. Macdonnell*, 5 M. & S. 228. The fraud being admitted, the onus of proving that a good consideration was given for the bill rested on the plaintiff: and the mere fact of its having been passed to account, without any new consideration, is not sufficient—*De La Chaumette v. The Bank of England*, 9 B. & C. 208; *Cranch v. White*, ante, Vol. 1, p. 314, New Cases, 414.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—

In this action, which was brought by the plaintiff as indorsee of three bills of exchange for 500*l.* each, two of which purported to be drawn by one P. Clissold, and the third by one Thomas Wilson, upon and accepted by the defendant, the jury found a verdict for the defendant

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upon one of the bills drawn by Clissold, and for the plaintiff upon the other two bills; and the case is brought before us upon a motion by the defendant to enter a nonsuit, and also for a new trial. Two objections were urged at the trial as grounds for a nonsuit—first, the want of a proper stamp upon an agreement produced in evidence by the plaintiff—secondly, that neither the bill of exchange drawn by P. Clissold, nor that drawn in the name of Wilson, were producible in evidence, the former not being drawn according to the custom of merchants, and the latter appearing on the evidence to be a forgery, and not the genuine bill of any person really in existence.

First point.

1. As to the objection that the agreement was improperly stamped, it arose thus:—It became a necessary part of the plaintiff's case to prove that he was a bonâ fide holder of the three bills for a valuable consideration; and the consideration set up by him was, that the bills of exchange were given by one Dimsdale, a cornfactor, to Rucker & Grohte, the agents of the plaintiff, under an agreement by which on the one hand they were to deliver to Dimsdale the bills of lading of a cargo of wheat belonging to the plaintiff, and on the other to hold the three bills of exchange, together with certain other bills, as a security to the plaintiff for the price of the wheat. It was proved, that, on the 10th August, Dimsdale did in fact deliver two of the three bills of exchange to Rucker & Grohte, and that, on the 12th, he received from them one of the bills of lading for about half the cargo; but that he did not deliver the third bill of exchange to Rucker & Grohte till the 16th; when, the other securities not having been delivered by Dimsdale as stipulated for, and some doubt existing as to his solvency, the plaintiff's agents refused to part with their entire control over the second bill of lading, and put it into the hands of a third party, who was to hold it as between both parties. Ultimately, however, the sum of 600*l.* was raised upon it by sale of part of the

wheat, and paid over to Dimsdale, or to his use. On the 19th August, Dimsdale stopped payment; being at that time indebted to the plaintiff in respect of the wheat delivered under the first bill of lading, and the money raised for his use upon the second bill of lading, in a sum somewhat exceeding the amount of the three bills of exchange. It is obvious, therefore, that there was a good and valuable consideration given for these bills, if the three bills were in fact delivered to Rucker & Grohte on the agreement above stated: and, in order to prove it, the plaintiff called Grohte, who stated an agreement to have been made verbally to the effect above stated, and that, whilst he and Dimsdale remained in the counting-house, he (Dimsdale) wrote a letter, and signed it, and handed it over to the witness, which letter, as the witness stated, contained the contract; after which, and whilst they still continued together, the witness wrote another letter to Dimsdale and signed it, and delivered it to Dimsdale: each party keeping the letter signed by the other. The two letters were then put in, the letter written by Dimsdale being stamped with an agreement stamp of 1*l*. Upon which two objections were taken by the defendant's counsel—first, that the agreement was to be made out, not from Dimsdale's letter only, but from the two letters taken together, and in such case the stamp act required a stamp of 1*l*. 15*s*. upon one of the letters, and that the stamp of 1*l*. only was insufficient—secondly, that, if either of the letters taken singly constituted the agreement, it was not the letter signed by Dimsdale, which ought to be considered as a proposal only, but the letter of Rucker & Grohte, which must be considered as the acceptance of such proposal, and therefore as the agreement itself. On the other hand, it was contended by the plaintiff that the agreement related to the sale of goods, wares, and merchandizes, and therefore fell within the exception in the stamp act, and was altogether exempted from any stamp; or, if it was an

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agreement to be proved from the two letters, still that the stamp of 1*l*. only was sufficient, the stamp of 1*l*. 15*s*. not being imposed unless the number of words exceeded 1060, which was not the case here. These points were severally discussed before us in argument; but, upon the ground on which we deem the letter of Dimsdale to be admissible as evidence of the agreement, it becomes unnecessary to give any opinion on either of the points argued before us: for, the letter of Rucker & Grohte, which was written subsequently to Dimsdale's, appears upon inspection not to be an acceptance of the proposal contained in Dimsdale's letter, but is altogether at variance with such proposal; Dimsdale's letter in effect declaring that he consented that the three bills should be set against the price of the plaintiff's wheat; Rucker & Grohte's letter, on the contrary, stating that two of the bills, with a third bill of G. P.'s, should when cashed be placed against Dimsdale's private account with them: and adding other conditions on which they proposed to deliver the two bills of lading to Dimsdale. The two letters therefore not relating to the same contract, it becomes necessary to decide which of the two constitutes the agreement on which the bills were delivered over. And we are of opinion, in the situation of the parties, such agreement is to be taken from the letter of Dimsdale. Dimsdale, being the owner of the bills of exchange, writes to Rucker & Grohte, as the agents of Schultz, that he is willing to hand over the bills of exchange on receiving the bills of lading for the wheat. At that time, he being the holder of the bills, had alone the control over them; Rucker & Grohte had no right to them whatever. Dimsdale therefore might hand them over on whatever terms he thought proper; either as a security for the wheat of the plaintiff, or in payment of his private account. And, if Rucker & Grohte received the bills, they had no power, after they so received them, to apply them to a different account.

The real question is, upon what account were the bills paid; and, when Dimsdale writes a letter directing the bills to be set off against the wheat, Rucker & Grohte, if they receive the bills at all, must be taken to consent that they shall be so applied: and no letter subsequently written by them ascribing the bills to a different account can alter the terms on which they were originally delivered by the owner of the bills, unless he subsequently assents to such new proposal. *Solvitur in modum solventis*. We think, therefore, as between the two letters put in, it is Dimsdale's, and Dimsdale's alone, which contains the terms on which the bills were delivered over, and consequently it was his letter only which required to be stamped. This makes it unnecessary for us to give any opinion upon the points which have been argued before us on the operation of the stamp act.

The second ground of nonsuit rests upon the invalidity of the two bills of exchange. As to the bill drawn by Clissold, the objection is, that, admitting that a party may be bound by his acceptance written on a blank piece of stamped paper to the extent of such sum as the stamp will cover, yet that this giving of a blank acceptance authorizes only the party to whom it is given to draw the bill; or, at all events, does not authorize a stranger (as was Clissold in this case) to sign his name on the same blank piece of paper as drawer, the bill itself being subsequently written upon the paper by some other person. No authority has been cited to us for any such restriction of the general doctrine above admitted; nor can we see any distinction in principle, where the bill has passed into the hands of third persons, between holding the acceptor liable to a given amount when the bill is afterwards drawn in the name of the party who has obtained the acceptance, and when it is drawn by a stranger who becomes the drawer at the instance of the party to whom the acceptance is given. The blank acceptance is an acceptance

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of the bill which is afterwards put upon it; and it seems to follow from the doctrine of Lord Mansfield, in *Russel v. Langstaffe*, Doug. 514, that it does not lie in the mouth of the acceptor to say that the drawing or indorsing of the bill is irregular. The acceptor was a stranger to the party to whom he handed over his blank acceptance; and, as all that he desired was to raise the money, it could make no difference to him, either as to the extent of his liability, or in any other respect, whether the bill was drawn in the name of one person or another. And, if the defendant is estopped from denying the right of the drawer to draw the bill, whoever he may be, he is bound by the indorsement made by such drawer, after such indorsement is proved to have been made by such drawer. And, as to the bill which purports to be drawn by Wilson, the proof was, that it was drawn and indorsed by a real person, who signed the name Thomas Wilson, although his real name was Thomas Wilson Richardson. There were no circumstances proved to shew an intention to pass himself off for a different person of the name of Thomas Wilson, or an intention to defraud any person of that name, or any other person: and we therefore think there is no ground for treating the signature as a forgery, or holding the bill void on that account. The present case does not carry the law further than that of *Cooper v. Meyer*, 10 B. & C. 468, 5 M. & R. 387, where the acceptor was held liable to the indorsee of a bill of exchange, he having accepted the bill drawn in the name of a fictitious person, and the bill being indorsed in the same fictitious name; the drawing and indorsing being both proved to be in the same handwriting. We see, therefore, no reason for holding that a nonsuit ought to be entered on either of the grounds above stated.

As to that part of the motion which goes to a new trial; it is undoubtedly true that there was considerable contradiction in the evidence upon the two points in the case

which it was essential for the plaintiff to establish, viz. that he gave a valuable consideration for the bills, and that he took them honestly and bona fide, and without knowledge of the fraud which had been practised on the defendant in procuring his acceptance. But the points themselves were fit and proper for the discretion of the jury; and to give the proper value to evidence is peculiarly their province; and in this case they have exercised their discretion on the circumstances proved before them, by finding their verdict for the defendant on one of the bills, and for the plaintiff on the other two. And we cannot say that the verdict is one which is so clearly against the evidence as to authorize us, consistently with our general rules of proceeding, to send the cause down to another jury. The rule therefore must be discharged.

Rule discharged.

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THIS was an action brought by the assignee of lessee against lessor, for breach of a covenant in an indenture of lease whereby the lessor engaged to pay for hay, straw, &c., left upon the demised premises at the expiration of the term. The venue was laid in London. The defendant pleaded several pleas, which were not material to the present inquiry. At the trial it appeared that the premises were situate in the county of Surrey: and it was thereupon objected on the part of the defendant, that, as the action was local, being brought upon a covenant running with the land, a trial in Middlesex would be a mistrial, and therefore the plaintiff must be nonsuited. A verdict was, however, taken for the plaintiff, by consent, and the cause and all matters in difference referred under an order of Nisi Prius to a barrister, with a direction to him to raise the point upon his award. The arbitrator having

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In covenant by assignee of lessee against lessor, upon a covenant running with the land, the venue was laid in London. At the trial it appeared from the evidence that the land was situate in Surrey:—Held, that, inasmuch as it did not appear upon the record that the venue was laid in the wrong county, the defendant was not entitled to have a nonsuit entered.

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made his award, directing certain payments to be made by the plaintiff, and finding that the premises in question were situate in Surrey, and that the action was brought in London—

Platt, on a former day, obtained a rule nisi to enter a nonsuit.

Wilde and *Atcherley*, Serjeants, and *Channell*, shewed cause.—Assuming that the defendant might have availed himself of the objection, had he raised it in the proper form; yet, according to the course the cause has taken, there is no pretence for entering a nonsuit. Questions of this sort ought to be presented at a convenient time and in a convenient form. Here, the venue is laid in London; and it no where appears, either in the declaration or in any of the subsequent pleadings, where the premises are situate. A plaintiff can never be nonsuited who proves every thing which his declaration alleges. The objection cannot arise unless a discrepancy between the venue and the locality of the land appears upon the face of the record, by demurrer or plea; except where the action is made local by some statute. In 1 Wms. Saund. (4th edit.) 241 b, n. (6), it is said: "Covenant by the assignee of the lessee against the lessor or the grantee of the reversion, is local; for it lies at the common law in respect of the privity of estate, which is always local—5 Rep. 17. a., *Spencer's* case; F.N.B. 146.C. But, in all these cases, if such local action be brought and tried in a wrong county, the defect is aided after verdict by statute 16 & 17 Car. 2, c. 8, and therefore, when the defendant intends to take advantage of the wrong venue, he must demur to the declaration—*The Mayor &c. of London v. Cole*, 7 T.R. 583; *Bailiffs of Litchfield v. Slater*, Willes, 431." Lord Kenyon, in *The Mayor &c. of London v. Cole*, says: "In the first place, it does not clearly appear that the land lies in the county—

of Middlesex: it is described as *heretofore* part of a field in the parish of St. Luke, in the county of Middlesex; but for any thing that appears on this record this field may have changed its jurisdiction; so lately as in the reign of Henry 8, part of Chester was taken out of that county, and the same thing has happened in several other counties. At the most the words used in this declaration are equivocal. Then, consider the effect of the statute 16 & 17 Car. 2: that would little deserve the name of an omnipotent act, as it has sometimes been called, unless it would cure such an objection as the present, that is taken merely to elude the justice of the case. But I think that that act has cured the defect, if it were a defect; and I cannot express myself in better terms than Kelynge, C. J., and Rainsford and Norton, Justices, did in one of the cases cited (*Craft v. Boite*, 1 Saund. 246), who said that 'the words of the statute were plain; that the issue was tried by a jury of the proper county where the action was brought, which was within the express words of the statute, and (as they conceived) within the intent of the statute.'" So, in *The Bailiffs of Litchfield v. Slater*, it was expressly held, upon a careful review of all the authorities, that it is no objection after verdict that an action of covenant for not repairing &c. was brought and tried in a foreign county, that defect being cured by the statute 16 & 17 Car. 2, c. 8. Upon what principle could the plaintiff be nonsuited? Whether the jury are to find an issue proved or disproved, is altogether foreign from any question of jurisdiction. And whether the venue is local or not, is a mere question of law that might more conveniently be raised by demurrer: it must in some way appear upon the record.

Platt and Ogle, in support of the rule.—It may be conceded that on the record as it now stands it must be intended that the land is locally situate in the place where the venue is laid. But here the evidence established a

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variance in this respect. The cases cited in the note to *Graft v. Beite*, arose on motions in arrest of judgment. Undoubtedly the defendant *might* have raised the question here by demurrer or by plea; but, was he *bound* to do so? Suppose these premises had been described as No. 100, Holborn, would the court take judicial notice as to whether they were in London or in Middlesex? When the jury are assembled in London to try an issue respecting land in Surrey, necessarily local in its nature, the moment it appears from the evidence that the land is in Surrey, the court and jury have no jurisdiction to try it in London. [*Tindal*, C. J.—Suppose the plaintiff chose to appear, what course would you take?] If the plaintiff fails in shewing that he is entitled to the verdict, the jury must necessarily find for the defendant. [*Bosanquet*, J.—On what issue could the verdict be found for the defendant, there being none on the locality of the premises?] Suppose the case of a penalty incurred in one county and sued for in another, the action being local by statute; the defendant might waive the objection, but still the jury could not find for the plaintiff. In *Tidd's Practice*, 9th edit. 487, the rule is thus stated: "When the action could only have arisen in a *particular* county, it is *local*, and the venue must be laid in that county: for, if it be laid elsewhere, the defendant may demur to the declaration, or the plaintiff, on the general issue, will be nonsuited at the trial." For this position, that learned author cites *Bruckshaw v. Hopkins*, Cowp. 409, where, upon a rule for bringing back the venue being opposed, Lord Mansfield said: "If it should appear to be a local action by statute, he (the plaintiff) will be nonsuited on the opening." In 1 *Chitty on Pleading*, 4th edit. 241, the rule is laid down in like manner; as also in *Stephen on Pleading*, 303, et seq. In *Warren v. Webb*, 1 Taunt. 379, the plaintiff declared that he was possessed of a dwelling-house in the parish of St. George the Martyr, in the county of Surrey, and that the defen-

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dant possessed a shop contiguous, and a wooden spout affixed thereon, for carrying off the rain-water from the roof, which spout it belonged to the defendant to keep in such repair that no injury should happen to the plaintiff's dwelling-house; and alleged that the defendant suffered the spout to be out of repair, to wit, at Westminster, in the county of Middlesex, whereby the rain-water soaked through the spout, and penetrated and injured the plaintiff's wall, to wit, at Westminster, in the said county. The premises were proved to be in Surrey. At the trial a verdict was found for the plaintiff, with liberty for the defendant to move to enter a nonsuit upon the ground that this was a local action, and that the venue ought to have been laid in Surrey, where the nuisance was committed. Sir James Mansfield, in delivering the judgment of the court upon a rule for entering a nonsuit, said: "The objection taken in this case was, that the plaintiff did not at the trial support his declaration. The defendant's counsel supposed that in the declaration the defendant's house was alleged to be in Middlesex, and the evidence was that the house was in Surrey. On reading the declaration, it at first appeared to me that the *videlicet* in the county of Middlesex, as applied to a house or anything else in Surrey, in its nature local, is nonsense, and a contradiction in terms. And, upon consideration, the true sense appears to be this: it is a description of a house, a local object, which it states to be in Middlesex, and consequently the objection must prevail. If this is not a description of the place where the defendant's house is situated, there is no description of it, and if no place is alleged in the declaration, it must be intended that the house lies in the county where the nuisance is alleged to be committed, which is Middlesex. Therefore, *quacunque viâ datâ*, the declaration is not supported." And the rule for entering a nonsuit was made absolute. The effect of the note cited from 1 Wms. Saund. 246 *b*, is much weakened by the last edition.

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TENDAL, C. J.—I am of opinion that this rule must be discharged. The question is whether or not a nonsuit ought to be entered on the ground that the venue is laid in the wrong county; the action being brought on a covenant relating to land situate in Surrey, and the venue being laid in London. Having looked at the statute 16 & 17 Car. 2, c. 8, and considered the authorities to which our attention has been more particularly drawn, I am of opinion that the objection does not go to a nonsuit. The statute had for its object the prevention of arrests of judgment: and the 1st section enacts "that, if there be a verdict, judgment shall not be stayed or reversed for that there is no right venue, so as the cause was tried by a jury of the proper county or place where the action is laid." It appears therefore to be clear, that, after the passing of this statute, if in a local action the venue was laid in a wrong county and the cause there duly tried, the judgment could not be arrested on that ground. But, it is urged on the part of the defendant that the objection to the jurisdiction here was taken before the trial proceeded. We must try the question by the ordinary forms of proceeding before a jury. It is well known that a plaintiff cannot be compelled to submit to a nonsuit: he may at all times, if he thinks proper, go to the jury. On the present occasion he would have a very good reason for insisting upon the case going to the jury, inasmuch as he would then be relieved from this objection. There is nothing upon the face of the record to raise any question as to the locality of the premises; and nothing to entitle the defendant to a verdict.

PARK, J.—I am of the same opinion. A plaintiff is never bound to submit to be nonsuited. There is nothing on the face of this record to shew that the locality of the premises is at variance with the venue. The new rule applicable to the subject is the 8th of the general rules of Hilary Term, 4 Will. 4: "The name of a county shall in all cases be stated in the margin of a declaration, and shall

be taken to be the venue intended by the plaintiff; and no venue shall be stated in the *body* of the declaration, or in any subsequent pleading: provided that, in cases where local description is now required, such local description shall be given." If the defendant had intended to object to the absence of the local description of the premises in the declaration, he should have craved oyer of the indenture, and demurred on the ground of a variance. The objection, on the present state of the record, is cured by the 16 & 17 Car. 2, c. 8, after verdict. The judgment delivered by Willes, C. J., in *The Bailiffs of Litchfield v. Slater*, appears to me to be conclusive: the court there, against their own opinions, reluctantly yielded to the force of the authorities.

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GASELEE, J., was absent.

BOSANQUET, J.—The defendant had no right to insist upon a nonsuit, and he was not entitled to a verdict. The question might have been raised by setting out the indenture on oyer and demurring; or the variance might perhaps have been put upon the record by plea, as was done in *The Bailiffs of Litchfield v. Slater*, where it was determined, and is now considered settled, that an objection of this nature cannot be made the subject of a motion in arrest of judgment, being cured by the statute 16 & 17 Car. 2, c. 8. The plaintiff here had a right to appear, and did appear, and therefore there could not be a nonsuit. And there was no issue upon which this matter could be given in evidence; no issue upon which the jury could have given any verdict so as to raise the question.

Rule discharged, without costs.

A rule nisi was afterwards obtained for an attachment against the defendant for nonpayment of the money awarded

money pursuant to an award, where the demand is made under a power of attorney, it must appear that the power of attorney was produced to the party at the time the demand was made.

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 To found a
 motion for an
 attachment for
 non-payment of

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by the arbitrator. The demand was made under a power of attorney; but neither the power of attorney, nor the award, or the rule of court thereon, were produced at the time of the service of the copy of the award.

Platt shewed cause.—He submitted that the defendant could not be said to be guilty of a contempt unless it appeared that he had been made aware of the existence of all the documents necessary to entitle the party to make the demand: and he relied on *Jackson v. Clarke*, 13 Price, 208, M'Clel. 72, where it was held, in the court of Exchequer, that affidavits whereon to ground a rule nisi for an attachment against a defendant for nonpayment of money and costs pursuant to an award, and the master's allocatur, where the demand has been made by a third person under a power of attorney, should state that the original power was shewn to the defendant at the time when the demand was made.

PER CURIAM.—The universal practice has always been understood to require the original to be shewn, on the service of a copy. Where it is sought to bring a party into contempt, the practice in this respect ought to be very strictly adhered to.

Rule discharged (a).

(a) See *Reid v. Deer*, 7 D. & R. 612; *Dicas v. Warne*, ante, Vol. 1, p. 537; *Wadsworth v. Mar-* shall, 3 Tyr. 328, 1 C. & M. 87; *Rex v. Soloman*, 1 Dowl. 618.

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TAYLOR v. SLATER.

Monday,
Feb. 1st.

THE affidavit of debt in this case was made on the 21st February, 1834; the process thereon was not sued out until the 18th January, 1836; and the defendant was arrested on the same day. On the 29th instant—

Semble that a defendant cannot be held to bail upon an affidavit made more than a year before the issuing of the writ.

Wilde, Serjeant, obtained a rule nisi for his discharge from custody, on the ground that the affidavit was functus.

Semble that the 33rd rule of Hilary Term, 2 Will. 4, as to the time for moving on the ground of irregularity, does not apply with equal force to the case of a prisoner as to that of a defendant at large.

Andrews, Serjeant, shewed cause.—In *Tidd's Practice*, 9th edit. p. 190, it is said: "An affidavit to hold to bail continues in force for a year; during which period the defendant may be arrested on the first or any subsequent process sued out thereon. But an affidavit made more than a year before the suing out of the writ is not sufficient to authorize an arrest in the King's Bench; for, the act requires an oath of a subsisting debt at the time of suing out the process; and, after a year, it will be presumed that the debt has been paid, if nothing appear to the contrary—*Collier v. Hague*, 2 Str. 1270; *Pitches v. Davy*, MS. Hilary, 44 Geo. 3; *Stewart v. Freeman*, MS. 47 Geo. 3, K. B.: but see *Crooks v. Holditch*, 1 B. & P. 176. It is therefore necessary that a new affidavit should be made before a writ is sued out, when more than a year has elapsed since the making of the former affidavit." The cases there cited are all King's Bench decisions: the rule suggested has never obtained in this court. [*Tindal*, C. J.—The reason of the thing is applicable to the practice of all the courts.] The defendant should at least make an affidavit that the debt has been paid. [*Tindal*, C. J.—He has a right to rely upon the presumption of law.] Then, the application is too late. The arrest took place on the 18th January; consequently the time for putting in bail expired on the 27th; and the motion was not made

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until the 29th. In *Tucker v. Colegate*, 2 C. & J. 469, 2 Tyr. 496, 1 Dowl. 574, it was expressly held that objections to the affidavit to hold to bail cannot be taken after the time for putting in bail above has elapsed.

Wilde, Serjeant, in support of his rule, submitted that the rule as to the time for moving to set aside process or proceedings on the ground of irregularity, did not apply to the case of a prisoner; and that, at all events, the objection could not arise on the present occasion, there being in point of law no affidavit at all upon the files of the court.

PER CURIAM.—The rule certainly does not apply with the ordinary strictness in the case of a prisoner (a).

Rule absolute.

(a) But see *Fownes v. Stokes*, ante, p. 205.

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SIMPSON v. COOPER.

The declaration was delivered on the 12th January, with notice to plead in four days; on the 13th the defendant obtained a judge's order for "seven days' time to plead," upon an undertaking to accept short notice of trial for the last Sitting in the term, the 26th:—Held, that the seven days commenced from the date of the order, and not from the expiration of the four days.

ANDREWS, Serjeant, on a former day, obtained a rule nisi to set aside the judgment signed in this case for want of a plea, for irregularity. The irregularity complained of was that the judgment was signed before the time for pleading had expired. The declaration was delivered on the 12th January; on the 13th, a judge's order was obtained for "seven days' time to plead," the defendant undertaking to receive short notice of trial for the last Sitting in the present term. The question was, whether the seven days were to be reckoned in addition to the four days which the defendant originally had by the practice of the court.

Wilde, Serjeant, shewed cause.—If the seven days' time to plead were to commence at the expiration of the four days, the whole time for pleading would not expire till the 24th; the last Sitting was on the 26th; consequently, there would be no time to give notice for that day. The bargain between the parties furnishes evidence of what was the understanding of the judge when he made the order; and it is quite manifest that convenience requires, that, when a defendant asks for a definite time to plead, the time granted should in all cases commence from the date of the order. In *Aspinal v. Smith*, 8 Taunt. 592, 2 Moore, 655, the order was for *further* time to plead.

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Andrews, Serjeant, in support of his rule.—The defendant here had originally four days wherein to plead. The judge's order superadds seven days in addition to the four. There is nothing in *Aspinal v. Smith* to differ that case from the present. It was there expressly held, that, where notice to plead is given, and, before the expiration of the time named in the notice, a judge's order for further time to plead is obtained, such time is to be reckoned from the expiration of the time named in the notice to plead, and not from the date of the judge's order. The judgment therefore was clearly premature.

TINDAL, C. J.—The declaration was delivered on the 12th January, and the judge's order for "seven days' time to plead" dated on the 13th. The defendant contends that he had the seven days in addition to the four days he was originally entitled to by the practice of the court. If so, that would bring it to the 24th, which, being Sunday, we may call the 25th—one day before the last Sitting. On the other hand, it is alleged on the part of the plaintiff, that, according to the compact between the parties, the seven days were not intended to be given in addition to the four, for that would avoid the condition

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upon which the seven days' time was granted, viz. that short notice of trial should be given for the last Sitting. I think the construction put upon the order by the plaintiff is the correct one, and consequently this rule must be discharged.

PARK, J., and BESANQUET, J. concurring.

Rule discharged.

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After issue joined and a peremptory undertaking to try, the court permitted the plaintiff to amend his declaration by substituting a count in trover for a count in case for negligence in the custody of the plaintiffs' goods.

STORR and Another v. WATSON.

THIS was an action on the case.—The declaration consisted of a single count charging that the defendant on the 18th April, 1835, had the care and custody of certain goods and chattels, to wit, &c., and thereupon it then became and was the duty of the defendant, whilst he so had the care and custody of the said goods and chattels, to take due and proper care thereof; yet the defendant, not regarding his duty in that behalf, did not nor would, whilst he so had the care and custody of the said goods and chattels, take due and proper care of the same, but wholly neglected so to do, and took such bad care thereof that afterwards, to wit, on &c. aforesaid, the said goods and chattels became and were purloined, stolen, and wholly lost to the plaintiffs, &c.

The defendant pleaded—first, not guilty—secondly, that the defendant did not have the care or custody of the said goods and chattels in the declaration mentioned, or of any of them, or any part thereof—thirdly, that it did not become nor was it the duty of the defendant to take due and proper care of the said goods and chattels, or any of them, or any part thereof.

Issue was joined in Trinity Term last, and notice of trial given for the sittings after term. The plaintiffs not having proceeded to trial in pursuance of such notice, the

defendant in Michaelmas Term obtained a rule nisi for judgment as in case of a nonsuit, which rule was subsequently discharged upon the plaintiffs' giving a peremptory undertaking to try at the sittings after that term. The plaintiffs, under the advice of counsel, withdrew the record, with a view to obtain leave to amend the count or to add thereto a count in trover. On a former day in this term—

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Wilde, Serjeant, obtained a rule nisi accordingly.—The affidavit upon which the motion was founded negatived any intention to introduce into the declaration a new cause of action.

Channell shewed cause.—The only case to warrant such an amendment as that proposed here, is *Billing v. Flight*, 6 Taunt. 419, where, after a lapse of six terms, the court permitted the form of the action to be changed from *assumpsit* to *debt*, either of which might indifferently have been adopted in the first instance. But, in *Green v. Milton*, 4 B. & Ad. 369, after issue joined, and a peremptory undertaking given, the court of King's Bench refused to allow the declaration to be amended by the substitution of a count in *detinue* for *trover*.

Wilde, Serjeant, in support of his rule, proposed to dispense with the existing count, and have only a count in trover.

PER CURIAM.—To compel the plaintiffs to bring another action, would only be entailing upon them an useless expense, without at all benefiting the defendant. We therefore think they ought to be allowed to turn the present count into a count in trover, upon payment to the defendant of the costs occasioned by such amendment, and the costs of the application, including the costs of the

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day arising from the plaintiffs' not having proceeded to trial: the defendant to be at liberty to plead *de novo*.

Rule absolute accordingly (a).

(a) One of the earliest cases in which a declaration was allowed to be amended, is *Marlborough v. Widmore*, 2 Stra. 890, where the court permitted a declaration at the suit of executors on a promise to the testator, to be amended by inserting a promise to the plaintiffs. In *Brown v. Crump*, 6 Taunt. 300, new counts were added after a demurrer, and after the lapse of two terms. In *Freen v. Cooper*, 6 Taunt. 358, a declaration by assignees of a bankrupt for a rescue, alleging the wrong to have been done to them, was amended by the substitution of an allegation of wrong done to the provisional assignee: Gibbs, C. J., there said that the rule prohibiting amendments after the lapse of two terms, applied only to the case of an amendment embracing a new cause of action. In *Minchin v. Cope*, 1 Chit. Rep. 45, the record was amended, after writ of error brought, by altering the memorandum of the time of filing the plaintiff's bill. In *Doe v. Armitage*, 1 D. P. C. 173, in a declaration in ejectment, a new count (upon another demise) was added after three terms. And in *Morris v. Evans*, 1 D. P. C. 657, in case for disturbance of a ferry, after the

cause had been taken down for trial, and the record withdrawn, the court allowed the declaration to be amended by varying the termini of the ferry: and the rule is thus stated by the court: "The rule adopted at chambers is, that you may at any time introduce a new count, if you do not thereby introduce a new cause of action, but only a variation in the mode of stating it." And in *Aylwin v. Todd*, 1 New Cases, 170, where the plaintiff had been misled by the defendant as to the nature of a charterparty, the court permitted the plaintiff to amend by striking out a count in covenant on the charterparty, and declaring for freight, not upon the charterparty; and this after many years had elapsed since the commencement of the action, the defendant having been the cause of the delay.

See also *Billing v. Flight*, 6 Taunt. 419, *Billing v. Pooley*, 6 Taunt. 422, and the cases cited in *Tidd's Practice*, 9th edit. p. 697, and *Arch. Pr.* 3rd edit. p. 838.

As to amendments in penal actions, see *Mathews v. Swift*, 1 Scott, 706, and the cases there cited: and see *Levett v. Kibblewhite*, 6 Taunt. 483, as to amendments affecting bail.

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HOLMES v. EDWARDS.

WILDE, Serjeant, on the part of the defendant, obtained a rule calling on the executors of the plaintiff, deceased, to shew cause why they should not pay the costs of taxation. It appeared that the defendant had offered to dispense with the taxation if the attorney would take off 100*l.* from the bill; and that the prothonotary, on the taxation, had taken off within 3*l.* or 4*l.* of that sum, being something less than one-sixth of the entire amount.

Talfourd, Serjeant, shewed cause; and *Wilde*, Serjeant, was heard in support of his rule.

PER CURIAM.—This is an application to our discretion. Under the circumstances, the costs of taxation having been rendered necessary by the non-acceptance of the offer of reduction, we think those costs should be paid by the party by whom they were occasioned.

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Where an offer had been made to dispense with taxation, provided a certain sum were deducted from the bill, and on the taxation the bill was reduced by nearly the sum mentioned, though less than one sixth of the bill—the party requiring the taxation was directed to pay the costs thereby occasioned.

GRIFFIN v. YATES.

ASSUMPSIT.—The declaration stated that one W. Lambert, on the 26th September, 1834, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said W. Lambert, or his order, 318*l.* 12*s.* 2*d.*, for value received, six months after the date thereof, which period was now elapsed; that the defendant then accepted the said bill; and that the said W. Lambert then indorsed the same to the plaintiff: of all which premises the defendant had due notice, and promised the plaintiff to pay the amount according to the tenor and effect of the bill and of his acceptance thereof. Breach—nonpayment.

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The general replication de injuria may be pleaded in assumpsit in answer to a plea consisting merely of matters of excuse.

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Plea—that the defendant accepted the bill of exchange in the declaration mentioned for the accommodation of the said W. Lambert, and upon the understanding and promise of the said W. Lambert, in that behalf then made and given, that he the said W. Lambert should, on application, furnish the funds for the payment of the said bill, and that the defendant should not be called on to pay the said bill until it should be at the will and discretion of the defendant so to do; and that no consideration whatsoever was ever given to the defendant, or to any other person or persons, for or on account of the acceptance or payment by the defendant of the said bill of exchange, or for any part of the same; that the said W. Lambert indorsed the said bill of exchange to the plaintiff after the said bill of exchange became due and payable; for the accommodation of the plaintiff, and without any consideration being given to the said W. Lambert, or to any other person or persons, for the said bill of exchange or for any part of the same: and this the defendant was ready to verify.

Replication—that the defendant did not accept the said bill of exchange in the declaration mentioned for the accommodation of the said W. Lambert, and upon the understanding and promise of the said W. Lambert in that behalf then made and given that the said W. Lambert should on application furnish the funds for the said bill, and that the defendant should not be called upon to pay the said bill until it should be at the will and discretion of the defendant so to do, and without any consideration whatsoever being ever given to the defendant or to any other person or persons for or on account of the acceptance or payment by the defendant of the said bill of exchange, or for any part of the same; and the said W. Lambert did not indorse the said bill of exchange to the plaintiff after the said bill of exchange became due and payable, for the accommodation of the plaintiff, and without any consideration being given to the said W. Lambert

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or to any other person or persons for the said bill of exchange or for any part of the same, in manner and form as the defendant had shewn in his said plea alleged: and this the plaintiff prayed might be inquired of the country &c.

Special demurrer—assigning for causes, that the plaintiff by his said replication had traversed and put in issue the allegation that the defendant did accept the said bill of exchange in the declaration mentioned for the accommodation of the said W. Lambert and upon the understanding and promise of the said W. Lambert in that behalf then made and given that he, the said W. Lambert should, on application, furnish the funds for the payment of the said bill, and that the defendant should not be called upon to pay the said bill until it should be at the will and discretion of the defendant so to do, and without any consideration whatsoever being given to the defendant or to any other person or persons for or on account of the acceptance or payment by the defendant of the said bill of exchange, or for any part of the same; and had also in and by the replication traversed and put in issue the allegation that the said W. Lambert did indorse the said bill of exchange to the plaintiff after the said bill of exchange became due and payable for the accommodation of the plaintiff, and without any consideration being given to the said W. Lambert or to any other person or persons for the said bill of exchange or for any part of the same: whereas the plaintiff by his said replication ought to have traversed one only of such allegations.

The plaintiff joined in demurrer.

Stephen, Serjeant, in support of the demurrer.—The plea contains two material and traversable allegations—the one, that the bill was accepted for the accommodation of the drawer, and without any consideration moving from the drawer to the acceptor—the other, that it was in-

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dorsed by the payee for the accommodation of the plaintiff, and without any consideration moving from the latter to the former. It was competent to the plaintiff to traverse either of these allegations: but he has traversed both. The replication therefore is clearly bad for duplicity. If authority be wanting to shew this, it is to be found in Bro. Abr. Double Plea, pl. 90—"Det sur obligac. q' fuit cōdic. destoier al albitremt J. N. issint q'il ceo fait et deliver al parties p. tiel jour; le d'ēd. dit q' nul arbitremt fuit fait ne deliver devāt le jour: et cest double per totā Curia, car est bon plea q'il ne fist ascū arbitremt p. le jour, et est bon pleē q'il ne liver arbitremt devāt le jour." In *Simpson v. Clarke*, 2 C. M. & R. 342, where the plea was similar, the plaintiff in his replication traversed merely the allegation as to the want of consideration for the indorsement.

Butt, in support of the replication.—It would not have been enough for the defendant to shew that the bill was an accommodation bill; he must also shew that the holder stands in such a position that he is not entitled to sue upon it: consequently, neither of the facts alleged in the plea separately taken constituting a defence to the action, the plaintiff has properly put both in issue—*Stein v. Yglesias*, 1 C. M. & R. 565, 3 Dowl. 252. In *O'Brien v. Saxon*, 4 D. & R. 579, 2 B. & C. 908, to an action for maliciously suing out a commission of bankrupt against the plaintiff, the defendant pleaded that the plaintiff, being a dealer and chapman, and being indebted to the defendant in the sum of 100*l.*, became and was a bankrupt within the meaning of the statutes concerning bankrupts, wherefore the defendant sued out the commission in the declaration mentioned; the plaintiff replied that the defendant of his own wrong &c. committed the grievances mentioned in the declaration: on demurrer, on the ground that the plaintiff by his replication had attempted to put

In issue three distinct allegations, viz. the trading, the bankruptcy, and the petitioning creditor's debt—it was held that the replication was sufficient, the plea of bankruptcy being pleaded only as matter of excuse, and the whole constituting but one single issuable proposition, viz. the bankruptcy of the plaintiff. In *Crisp v. Griffiths*, 2 C. M. & R. 159, 8 Dowl. 753, to a declaration in debt on a promissory note the defendant pleaded, that, after the making of the note and accruing of the debt in respect thereof, the plaintiff drew a bill of exchange upon the defendant, which he accepted and delivered to the plaintiff, who took it for and on account of the note, and afterwards indorsed it to a person unknown to the defendant, and who, at the time of the commencement of the suit, was the holder thereof, and entitled to sue the defendant thereon: the plaintiff replied *de injuria*; and, on demurrer to the replication, it was held that the plea was bad, inasmuch as it did not aver that the bill was *given* as well as *taken* in satisfaction of the note. In *Noel v. Rich*, 2 C. M. & R. 360, 4 Dowl. 228, the court of Exchequer intimated an opinion that, to a plea that the defendant's indorsement was in blank, that the defendant delivered the bill to A. (not a party to the bill) only to get it discounted for him, that A. fraudulently, and in violation of that special purpose, delivered it to B. to secure a debt due from A. to B.—the general replication that the defendant broke his promise without the cause by him alleged in his plea—was good. And in *Isaac v. Farrer*, 1 Meeson & Welsby, 65, that court in the course of the present term have expressly decided the point. There, in *assumpsit* by the indorsee against the maker of a promissory note for 250*l.*, payable three months after date to the maker's order, and by him indorsed to one H. R., who indorsed it to the plaintiff; the plea began by stating that an advertisement had been inserted in a newspaper offering money to be lent on personal security, on application to Mr. A., 12,

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Fludyer Street, Westminster, and that, in consequence of that advertisement, the defendant called at that place, and saw A., and in consequence of representations made to him by A., he (the defendant) was induced to and did draw and deliver to A. two promissory notes, by each of which the defendant promised to pay to his own order the sum of £250l., three months after the date thereof (one of them being the note in the declaration mentioned) upon the faith of and promise from A. that the said notes should be renewed when due for the space of two years, and that he should receive from the said A. on a certain day, to wit, the Friday then next following, the amount of the said notes, deducting discount and stamps; that the said A. did not, either on the said Friday or at any other time, although often requested, pay to the defendant the amount of the said notes, deducting as aforesaid, or any sum of money whatever, but, on the contrary thereof, he the defendant on the said day, by appointment of the said A., went to the said place, to wit, &c., but the said A. was not, nor was any such person, either then or at any time afterwards, there to be found; and that the said transaction was a gross fraud and imposition upon him the defendant, and that the note was indorsed to the plaintiff without consideration, and that he held the same without value or consideration, and that there never was any consideration or value on the said note between any parties thereto: the plea then proceeded to aver that H. R. and the plaintiff, at the respective times when the note was so indorsed to them respectively, were privy to and had full knowledge and notice of the said transaction in the plea detailed, and of the said fraud and imposition—concluding with a verification. The plaintiff replied *de injuria*; and, on special demurrer, that replication was holden good, inasmuch as the plea amounted only to matter of excuse for the non-performance of the promise, and to one ground of defence only. Lord Abinger, in delivering the judgment of the

court, there says: "In the case of *Noel v. Rich*, this court expressed a strong opinion that this general form of traverse, in a case similar to the present, was proper: and we think that it is; for, the plea confesses that the defendant made the note in question and indorsed it to Richardson, who indorsed it to the plaintiff, which constitutes a prima facie case of liability, and an implied promise to pay the amount to the plaintiff; and it avoids the effect of that admission by shewing that the note was made and indorsed without value bona fide paid, whereby the defendant was excused from performing that promise. As to the objection that the replication is multifarious, the facts contained in the plea, though they are several, constitute one ground of defence; and the rule of pleading is not that the issue must be joined on a single fact, but on a single point of defence. This was laid down by Lord Mansfield in *Robinson v. Rayley*, 1 Burr. 816, by the court of King's Bench in *O'Brien v. Saxon*, and by Mr. Justice Bayley, in the case of *Carr v. Hinchliffe*, 7 D. & R. 42, 4 B. & C. 547. In each of these cases, the facts there allowed to be included in one issue, as amounting to a single ground of defence, were several. In the first, the facts that the cattle were commonable, and levant and couchant, constituted one proposition, viz. that the cattle were entitled to common; in the second, the trading, petitioning creditor's debt, and act of bankruptcy, formed one point of defence, viz. the bankruptcy of the plaintiff; and in the last the facts of the goods for the price of which the action was brought being sold by an agent as principal, and a set-off of a debt due from the agent, constituted the defence of payment or satisfaction of the plaintiff's demand. So, in the present case, the plea contains in substance one ground of defence only, that is, *that the plaintiff was not the bona fide holder for value*, although several facts are necessarily averred as constituting parts of it." It is clear therefore that both the allegations contained in this plea might have

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been put in issue by the general traverse: consequently, there can be no valid objection to the replication as it now stands, on the ground of duplicity.

Stephen, Serjeant, in reply.—It is not competent to a plaintiff to traverse all the allegations in a plea, where a traverse of either of them would of itself afford a full and sufficient answer. The general replication de injuria is an exception; but that does not apply to *assumpsit*; its application has never yet been extended beyond trespass and replevin—*Crogate's case*, 8 Rep. 132; *Selby v. Bardons*, 3 B. & Ad. 2. *Robinson v. Rayley* is an insulated case. Denison, J., there says: "The replication de injuria sua propria absq' tali causa will do in all cases where matter of title, and other things of that kind, are not included in the absque tali causa: and, if you admit them, you may then plead de injuria sua propria absque residuo causæ, traversing that residue. But the rule in *Crogate's case* does not affect this case; for, here the question is one single proposition, viz. the measure of the common: and the measure of the common is the levancy and couchantcy jointly with the property." [*Tindal*, C. J.—In that case, the plea consists in matter of excuse for a trespass which the defendant admits having committed. Here, it amounts to an excuse for the nonperformance of the promise. There, the whole amounted to but one single matter of excuse; and so, it is contended on the other side, does this. Why should not the same rule apply?] In *Robinson v. Rayley*, the plaintiff might undoubtedly have replied generally de injuriâ; and therefore it mattered little that he did so in another form. Here, however, the general replication is not admissible. The real question is whether there is any authority for holding that the whole of the matters stated in the plea amount to but one single point of defence: if not, then the replication is clearly bad. In *Webb v. Weatherby*, ante, Vol. 1, p. 477, 1 New Cases, 502, to a declaration in as-

sumpsit by the assignee of an insolvent debtor, for goods sold &c., the defendant pleaded that he paid a certain sum in full satisfaction and discharge of the promise in the declaration, and that the insolvent accepted and received the same in full satisfaction and discharge: the plaintiff replied that the defendant did not pay the insolvent the sum mentioned in full satisfaction and discharge, nor did the insolvent accept and receive the same in full satisfaction and discharge: it was held, on special demurrer, that the replication was good, simply because the fact of the payment being made in satisfaction was necessarily involved in the fact of the receipt being in satisfaction.

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Cur. adv. vult.

TINDAL, C. J., now said:—When this demurrer was argued before us the other day, we entertained but little doubt that the facts stated in this plea might in some way be put in issue; and that de injuria was the the more convenient form. The court of Exchequer, in *Isaac v. Farrer*, have laid down the rule that the general replication de injuria may be pleaded in assumpsit where the plea consists of mere matters of excuse—still adhering to the doctrine in *Crogate's* case. But, inasmuch as this has hitherto been matter of doubt, we think the plaintiff ought to have leave to amend.

Rule accordingly.

MORGAN v. PEBBER.

THIS was an action commenced in the Lord Mayor's Court, and removed hither by writ of certiorari, upon

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Mayor's Court, the defendant is not at liberty under the 7 & 8 Geo. 4, c. 71, s. 2, to pay money into court in lieu of putting in and perfecting special bail.

On the removal
of a cause by
certiorari from
the Lord

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which it is required by the practice of the court that special bail shall be perfected.

Wilde, Serjeant, on the part of the defendant, moved for leave to pay into court the amount of the debt, and the usual sum for costs, in lieu of putting in and perfecting special bail, under the 7 & 8 Geo. 4, c. 71, s. 2.

Talfourd, Serjeant, contra, referred to the language of the statutes 43 Geo. 3, c. 46, and 7 & 8 Geo. 4, c. 71, which allowed deposits in lieu of bail; first with the sheriff, and afterwards by payment into court; and submitted that they applied solely to actions commenced in the superior courts, and to cases where the party is actually arrested, not (as here) merely summoned.

Wilde, in support of his rule.—It is true the statutes are addressed to the case of arrests of the person; but the court will so construe them as to give effect to the remedy intended. Wherever anything may be done indirectly and circuitously, the court, in the exercise of a sound discretion, will, in order to save expense and delay to the suitors, permit it to be done directly: as in the case of entering an exoneretur on the bail-piece, a mode of relief not given by the act. Here, by section 4 of the 7 & 8 Geo. 4, c. 71, the defendant, after perfecting bail, may exonerate them by paying the debt and costs into court. The plaintiff, therefore, cannot possibly sustain any prejudice from the money being brought in in the first instance. [*Bosanquet*, J.—Does not that clause apply to a party who originally had the right to pay money into court?] This case is at all events within the equity of the section. The remedy is always advanced beyond the strict letter of the act, where the case is clearly within the mischief intended to be redressed.

The Court intimated a strong opinion that the case was not provided for by the statute: but, upon their recommendation, *Talfourd* consented to withdraw the objection. *Rule accordingly.*

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MEMORANDUM.

In the course of Hilary Term, the Lords Commissioners resigned the Great Seal.

The Right Honorable Sir C. C. Pepys (Master of the Rolls) was thereupon appointed Lord High Chancellor of England, and raised to the peerage by the title of Baron Cottenham, of Cottenham, in the county of Cambridge.

Henry Bickersteth, Esq., was appointed Master of the Rolls, and was raised to the peerage by the title of Baron Langdale, of Langdale, in the county of Westmoreland.

Their lordships took their seats in their respective courts on Tuesday the 19th January.

END OF HILARY TERM.

**THE Judges who sat in the Court of Common Pleas
during the foregoing term, were—**

Lord Chief Justice TINDAL,

Mr. Justice PARK,

Mr. Justice GASELEE,

and

Mr. Justice BOSANQUET.

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ACCOUNT STATED.

In an action against executors (upon an account stated) for a legacy, it is competent to the plaintiff to impeach any particular item or items on the credit side of the account. *Rose v. Savory*, 199.

ACKNOWLEDGMENT.

Affidavit of Verification.

1. A British consul has power by the 6 Geo. 4, c. 87, s. 20, to certify as to the handwriting and authority of the party before whom is sworn the affidavit verifying the certificate of the taking of an acknowledgment of a married woman (abroad) under the 3 & 4 Will. 4, c. 74. In *re Barber*, 436.

2. An affidavit verifying the certificate of acknowledgment by a married woman under the 3 & 4 Will. 4, c. 74, cannot be received if sworn in Ireland before a commissioner for taking affidavits in the Common Pleas in Ireland: it must be sworn before a commissioner of this court. In *re Anderson*, 626.

ACT OF PARLIAMENT.

Construction of.

By a canal act it was provided that it should be lawful for any person seised of or interested in any lands or hereditaments which should be set out for the purposes of the act, to contract for, sell, and convey to the company or their nominee the land so set out; that all such contracts, agreements, sales, exchanges, conveyances, and assurances should be valid and effectual in law to all intents and purposes, any law or statute to the contrary notwithstanding; and that all such contracts &c. should be inrolled by the clerks of the peace of the respective counties of Warwick and Worcester in which such lands &c. should lie: and, by a subsequent section, that, upon payment of the sum agreed for or assessed &c., such lands &c. and the fee simple and inheritance thereof should from thenceforth be vested in and become the sole property of the company for the purposes of the act:—Held, that the act did not dispense with a conveyance *in writing*. *Doe d. Robins v. The Warwick Canal Co.* 717.

And see *CASE*, 3.

ACTION ON THE CASE—see *CASE*.

ADMINISTRATION—see ECCLESIASTICAL LAW.

ADULTERY—see ARBITRATION, 1.

ADVERSE POSSESSION—see VENDOR AND PURCHASER.

AFFIDAVIT.

To hold to Bail.

Addition of Parties.

1. The addition of "widow" to the name of a party in the title of a cause is not necessary. *Miller, dem., Miller, Ten.* 117.

Description of Deponent.

2. In an affidavit used in shewing cause against a rule, the deponent was described as of "Lawrence Pountney, in the city of London," without stating whether parish, place, or lane:—Held, sufficient. *Miller, dem., Miller, ten.,* 117.

Form of.

3. An affidavit of debt in an action against the drawer of a bill of exchange stated that the bill was *undue* and unpaid, and *dis-
closed no default of the acceptor*:—Held, sufficient. *Irving v. Eaton,* 798. *Sed quære.*

Duration of.

4. Seemle that a defendant cannot be held to bail upon an affidavit made more than a year before the issuing of the writ. *Taylor v. Slater,* 880.

Before whom sworn.

5. Where an affidavit to hold to bail is sworn in Ireland before a commissioner for taking affidavits to be used in the Irish courts, his signature and authority to administer an oath must be verified by affidavit. *Sharp v. Johnston,* 405.
6. Quære whether an affidavit sworn before such a commissioner (he not being a commissioner for taking affidavits to be used in the English courts, under the 3 & 4 Will. 4, c. 42, s. 42), is good at all. *Id.*

Who may be held to Bail.

7. A defendant may be held to bail in this country, notwithstanding proceedings had for the same cause of action in Scotland—such proceedings not ensuring to deprive the party of liberty there, and the debt being unsatisfied. *Sharp v. Johnston,* 407.

On Motions and Rules.

Intituling.

8. Where a rule is obtained in two causes, the affidavits must be intituled in both of them, though the plaintiff and defendant be the same in both. *Corry v. Wharton,* 436.

Addition and Description of Deponent.

9. Where it appears by an affidavit in support of a motion

AFFIDAVIT.

*On Motions and Rules.**Addition and Description of Deponent.* (Confidential)

that the deponent (the defendant in the action) is in the Fleet prison, his place of abode need not be stated. *Sharp v. Johnston*, 407.

AGREEMENT.

Stamp on—See STAMPS, 1.

AMENDMENT.

Of Pleadings.

1. In a writ of right the tenant demurred to the count for a supposed deficiency in the statement of the descent. After argument the court permitted him to withdraw his demurrer and plead de novo. *Twining, dem., Lowndes, ten.*, 260.

2. After issue joined and a peremptory undertaking to try, the court permitted the plaintiff to amend his declaration by substituting a count in trover for a count in case for negligence in the custody of the plaintiffs' goods. *Storr v. Watson*, 842.

3. The court allowed the defendant to amend his pleadings after one of the plaintiff's witnesses had been examined and cross-examined under a judge's order—it appearing that, prior to the examination, the plaintiff's attorney was apprised of the proposed amendments, and the witness was examined with reference thereto. *Hollingworth v. Briggs*, 794.

ANNUITY.

Claimed under a Will.

1. Testator by his will charged an annuity upon certain leasehold premises, with a declaration, that, in case the leasehold specified should prove insufficient to discharge the annuity, the deficiency should be made up out of the rents and profits of his freehold premises. The annuitant distrained upon the freehold for arrears of the annuity. In replevin:—Held, that the will, even as against the annuitant claiming under it, did not dispense with proof that the testator died possessed of the leasehold. *James v. Salter*, 750.

2. An annuitant claiming under a will, who has never received the annuity, is not barred by the 3 & 4 Will. 4, c. 27, ss. 2, 3, although more than twenty years have elapsed since the right to the annuity first accrued to him. *Id.*

Proof under a Fiat against a Surety.

3. The instalments of annuity for the payment of which a surety expressly covenants in case of the default of the grantor, are not proveable under a fiat against the surety, where such instalments do not become due until after the bankruptcy of the surety. *Thompson v. Thompson*, 266.

ANNUITY.

Sufficiency of Memorial.

4. In a memorial of an annuity enrolled pursuant to the 53 Geo. 3, c. 141, s. 2, one of the columns was headed, thus:—"Person for whose the annuity is granted:"—Held, sufficient. *Knight v. Lord Lake*, 126.

APPURTENANCES—See TENURE, 2.

ARBITRATION.

Authority of Arbitrator.

1. In assumpsit for board and lodging furnished to the defendant's wife, an arbitrator to whom the cause was referred admitted evidence of the wife's adultery to be given under non-assumpsit, in answer to the action:—The court refused to set aside the award. *Symes v. Goodfellow*, 789.

Award, where final.

2. By a judge's order a cause and all matters in difference between the parties were referred to arbitration, the costs of the suit, and of the reference and award, to abide the event of the award. The arbitrator by his award directed that the defendant should by a given day deliver to the plaintiff certain goods, and that the plaintiff should on or before a certain other day pay a sum of money to the defendant; that, upon payment of the sum so awarded, the proceedings in the action should cease; and that each party should execute to the other a general release:—Held, that the award was sufficiently final, and that neither party was entitled to costs. *Yates v. Knight*, 470.

ARREST.

1. The defendant was arrested on the 12th May, carried to gaol on the 15th, and a declaration delivered on the 28th:—Held, that an application on the 4th June to discharge him out of custody, on the ground that he has been carried out of the county and there detained two days before he was taken to the county gaol, was too late. *Fownes v. Stokes*, 205.
2. Quære whether this would be any ground for discharging the defendant, even had the application been made in time. *Id.*

ARREST OF JUDGMENT—See SLANDER, 2.

ASSESSED TAXES—See TAXES.

ASSIGNMENT—See PRISONER, 1, 2, 3.

ASSUMPSIT—See MONEY HAD AND RECEIVED—PLEADING.

ASSURANCE—See INSURANCE.

ATTACHMENT.

For Nonperformance of an Award.

1. Where an award directs a bond to be delivered to the plaintiff on demand, a demand by one will not suffice, in the absence of a power of attorney from the other. *Sykes v. Haigh*, 193.

For impeding the Service of a Subpoena.

2. A defendant who keeps out of the way a witness material to the

ATTACHMENT.*For impeding the Service of a Subpoena—(Continued.)*

plaintiff, and thereby impedes the service of a subpoena, is liable to an attachment. *Clements v. Williams*, 314.

ATTORNEY.*Jurisdiction of the Court over Acts of.*

1. The court will not entertain a fiction touching the conduct of an attorney, unless it appears upon affidavit that he is an attorney of the court, or that the transaction arises, in part at least, out of a cause before the court: but will the court exercise its summary jurisdiction over an officer, unless in the case of a palpable fraud. In re *Lord*, 131.

2. The plaintiff's attorney, having ceased to act for him, and become attorney for the defendant, fraudulently procured the sheriff to return on a fi. fa. a sum larger than that actually levied and accounted for to the plaintiff. The court (at the expense of the attorney) ordered the return to be amended according to the fact. *Green v. Glasbrooke*, 261.

Delivery of signed Bill.

3. A plea to an action on an attorney's bill, that no signed bill has been delivered pursuant to the statute, is not a plea to the merits. *Beck v. Mondakut*, 173.

Costs of Taxation.

4. Where an offer has been made to dispense with taxation provided a certain sum were deducted from the bill, and on the taxation the bill is reduced by nearly the sum mentioned, though less than one sixth of the bill—the party requiring the taxation will be directed to pay the costs thereby occasioned. *Holmes v. Edwards*, 345.

AWARD—See INCLOSURE ACT.**BAIL.***Payment of Money into Court in Lieu of.*

On the removal of a cause by certiorari from the Lord Mayor's Court, the defendant is not at liberty under the 7 & 8 Geo. 4, c. 71, s. 2, to pay money into court in lieu of putting in and perfecting special bail. *Morgan v. Pebrer*, 854.

BANKRUPT.*Act of Bankruptcy.**Departing from the Dwelling-house.*

1. Upon an issue directed to try whether one P. had committed an act of bankruptcy on a given day, it appeared that, on the preceding day, he sent a letter from his dwelling-house at Greenwich to his place of business, addressed to his son, stating that he was unable to meet his engagements, and desiring that he might be denied to any creditor who might call; that, immediately after dispatching this letter, he left home, and remained

BANKRUPT.

BANKRUPT.

Act of Bankruptcy.

(bankruptcy) — (Continued)

Departing from the dwelling-house — (Continued) — A witness stated that P. called on the day in question at her brother's house in London; that he expressed to her an apprehension of being sent to the Fleet, and stated that he was in a hurry to get home, and would not go very early, as he had creditors who would lay hold of him; and that he did not leave till after dark. The jury were told, that, if they believed the statement made by the witness, P. on that occasion committed an act of bankruptcy: they said they did believe the witness, but they did not think P. spoke with bona fides. — Held, that P. had committed an act of bankruptcy. *Johnston v. Woolf*, 372.

Fraudulent Preference, in Contemplation of Bankruptcy.

2. In order to constitute a fraudulent preference, so as to avoid a payment made by a trader, it must be a voluntary preference and made in actual contemplation of bankruptcy: it is not enough to shew that the party was in such a state of insolvency and embarrassment as to render bankruptcy a probable event. *Atkinson v. Brindall*, 369.

3. F. & S., traders in partnership, being in insolvent circumstances, entered into a deed of composition with their joint creditors whereby they engaged to pay them 4s. 6d. in the pound upon the amount of their respective debts, by three instalments, F. & S. retaining possession of the stock in trade, and the creditors engaging to release them on payment of the last instalment. By the same deed F. assigned to the trustees a policy of assurance upon his life (which constituted his entire separate property), in trust to pay out of the proceeds the balance of the debts due to the joint creditors, and the surplus if any to his F.'s personal representatives. Two years after the date of the assignment a fiat issued against F. In an action brought by the assignees under the fiat against the trustees named in the deed, to recover the policy, S., who was called as a witness, stated that at the time of the execution of this deed his partner and himself entertained hopes of retrieving themselves: — Held, that the assignment of the policy under the circumstances did not constitute an act of bankruptcy: — Held, also, that it was properly left to the jury to say whether the deed was honestly and bona fide entered into for the purpose of enabling F. & S. to continue to carry on their trade, or with intent to defeat or delay any particular class of creditors; or whether the deed was voluntary and a fraudulent preference given by F. to the joint creditors of the firm. *Abbott v. Burbage*, 656.

Proof of Debt.

4. The instalments of an annuity for the payment of which a surety

BANKRUPT.

Proof of Debts—(Continued.)

expressly covenants in case of the default of the grantor, are not provable under a fiat against the surety, where such instalments do not become due until after the bankruptcy of the surety. *Thompson v. Thompson*, 266.

Rights and Liabilities of Assignees.

5. A commission of bankrupt issued against the plaintiff in July, 1824, under which he was declared a bankrupt. At the time of issuing the commission the plaintiff was not indebted to the petitioning creditor in the sum of 100*l.*; and the plaintiff disputed the validity of the commission on that ground. In January, 1831, the plaintiff applied to one of the commissioners of the court of Bankruptcy to appoint an official assignee under the commission, as well for the purpose of investigating the petitioning creditor's debts as for the purpose of taking care of the property of the estate. The defendant was accordingly appointed official assignee for the purpose aforesaid, but he never received any notice that the plaintiff disputed the commission, or that he (the defendant) was appointed for any special purpose.—Held, that the fact of the plaintiff having himself put the commissioner in motion, and thereby caused the appointment of an official assignee, did not stop him from suing the defendant for money received by him as assignee. *Munk v. Clark*, 475.

6. The defendant having in his possession a lease belonging to one S., which had been deposited with him as a security for monies advanced by him to S., and upon which he claimed a lien for costs against S. and also as against the assignee appointed under a commission of bankrupt issued against S. in 1830, concurred with the assignee in the sale of the lease, and received from him, in satisfaction of his demand, the amount of the purchase money, and also received with the assent of the assignee certain sums due for rent of the premises &c. The sale took place after the defendant, as solicitor to the assignee, had notice that a petition to supersede the commission, on the ground of the insufficiency of the petitioning creditor's debt, was pending. In January, 1832, the commission against S. was superseded, and in March a second fiat issued against him:—Held, that the assignees under the last-mentioned fiat were entitled to recover from the defendant the several sums so received by him from or with the assent of the assignee under the superseded commission. *Clark v. Gilbert*, 520.

7. To a count in debt by the assignees of a bankrupt for money had and received by the defendant to the use of the plaintiffs as assignees (not stating whether received before or since the bankruptcy), the defendant pleaded a set-off for money due to him on an account stated with the bankrupt before the bankruptcy:—Held, that the plea was bad, for that it did not shew that the debts were mutual. *Groom v. Mealey*, 171.

BANKRUPT—(Continued.)*Appropriation of Funds.*

8. Although the money first received under a Statute by the statute required to be appropriated in discharge of the expenses incurred by the petitioning creditor, yet, where he assents to a different appropriation, he is estopped from afterwards contending that the directions of the act have not been complied with. *Hornidge v. Dyland*, 357.

And see *TROVER*.

BILLS OF EXCHANGE AND PROMISSORY NOTES.*Acceptance in Blank.*

1. The defendant wrote his name (in the usual form of an acceptance) on blank stamped paper, and delivered them to one H. One C. afterwards put his name to the blanks as drawer and indorser; and they were then filled up by a stranger as bills of exchange for the payment of 500*l.* each:—Held, that the acceptor was estopped from saying that the drawing and indorsing of the bills was irregular. *Sobulitz v. Astley*, 815.

Drawn in a fictitious Name.

2. A bill of exchange was drawn and indorsed T. W., by a person whose real name was T. W. R. There was no evidence to shew that this individual had any intention to pass himself off for a different person of the name of T. W., or of an intention to defraud any person of that name, or any other person:—Held, no ground for treating the bill as a forgery, or for holding the bill void on that account. *Schultz v. Astley*, 815.

Not payable "to Order."

3. The defendant indorsed and delivered to the plaintiffs, in payment of goods, a promissory note made by one H. payable to R. & W. (without the words "or order"), and indorsed by R. & W. to K., and by K. to the plaintiff. The note being dishonored by the maker:—Held, that the plaintiffs were entitled to sue the defendant for the original consideration, notwithstanding no notice of the dishonor had been given—the instrument not being negotiable. *Plimley v. Westley*, 423.

BOND—see TAXES.**BRITISH CONSUL.***Administering Oaths, &c.*

A British consul has power by the 6 Geo. 4, c. 87, s. 20, to certify as to the handwriting and authority of the party before whom is sworn the affidavit verifying the certificate of the taking of an acknowledgment of a married woman (abroad) under the 3 & 4 Will. 4, c. 74. In re *Barber*, 436.

CARRIER.*Action against for the Loss of a Parcel.*

In an action against coach proprietors for the loss of a parcel con-

CARRIER—(Continued.)

taining cash and notes, it appeared that the parcel had arrived at the defendants' coach office in August, 1834, and was there lost; that, in June, 1835, a porter who was in the employ of the defendants at the time of the loss was sent by a guest at the hotel in the yard in which the office was situate with a 5*l.* note and five sovereigns to get a 10*l.* note in exchange for them; that the porter procured a 10*l.* note at a shop in the neighbourhood, and gave a 10*l.* note to the guest, which note proved to be one that had been contained in the lost parcel, and which the person from whom the porter was supposed to have procured it stated that he thought was not the same note he had given them. Upon an issue as to whether or not the parcel was lost through the felonious act of the defendants' servant, the jury having found for the plaintiff, the court refused to grant a new trial; the defendants not having called the porter. *Boyce v. Chapman*, 365.

CASE.*For malicious criminal charge.*

1. In an action for maliciously and without reasonable or probable cause charging the plaintiff with felony before a magistrate, it appeared that the plaintiff had lived in the service of the defendant, and on being discharged took away with her a trunk and bag, the property of the defendant; that, on the following day, the defendant wrote to desire the plaintiff to return those articles, and stating that unless she did so he would on the Monday following cause her to be apprehended; that the letter being, in consequence of the plaintiff's absence, unanswered, the defendant obtained a warrant for the apprehension of the plaintiff, and carried her before a magistrate, who dismissed her, the defendant declining to press the charge. The judge before whom the cause was tried left it to the jury to say whether or not the defendant had reasonable or probable cause for apprehending the plaintiff, and whether he was actuated by malice or not.—Held, that this direction was proper, and that the judge was not bound to take upon himself to decide as to whether or not there was reasonable or probable cause—it being a mixed question of law and fact. *Macdonald v. Rooke*, 359.

For maliciously outlawing the Plaintiff.

2. In an action on the case for maliciously and without reasonable or probable cause procuring the plaintiff to be outlawed, the declaration stated that the plaintiff was not in anywise subject or liable to be outlawed at the suit of the defendant; that the defendant made an affidavit of debt whereby he deposed that the plaintiff was indebted to him in 3550*l.*; and that the plaintiff, upon the prosecution of the defendant, under colour and pretence of owing the said sum of 3550*l.*, was declared an outlaw: assigning for special damage, that the plaintiff was put to costs in and about reversing the outlawry. The existence of the alleged debt (the non-existence of which was the only grava-

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For maliciously outlawing the Plaintiff—(Continued.)

men charged in (the declaration) being admitted.—Held, that there was reasonable and probable cause for proceeding to outlawry, notwithstanding the defendant was aware at the time of issuing the exigent that the plaintiff was allowed and had an agent in London:—Held also, that, under not guilty, the reversal of the outlawry was not put in issue;—and semble, that, if it had been, the rule of court and entry thereof in the officer's book was not evidence of that fact. *Drummond v. Pigou*, 228.

For Injuries resulting to Individuals from public Nuisances.

3. The defendants, under the authority of an act of parliament, which enabled them to close certain ancient ways therein mentioned, provided they opened another and a different way therein also described, stopped up and obstructed the ways, and kept and continued them so stopped up (no new ones being opened) for a period which the jury found to have been unreasonable and unnecessary. The plaintiff carried on the business of a bookseller in a court which formed a continuation of the line of thoroughfare so obstructed by the defendants, and his customers were proved to have consisted almost entirely of persons who had been in the habit of using the thoroughfare; and it was also proved, that, in consequence of the way being so obstructed, his business had materially declined:—Held, that the injury thus sustained by the plaintiff was such as to entitle him to maintain an action on the case, notwithstanding there might be many other individuals on the same line of thoroughfare similarly damaged by the act of which he complained. *Wilkes v. The Hungerford Market Co.* 446.

4. In case for a nuisance, the declaration stated that the plaintiff was possessed for the residue of a term of a messuage, and that he was disturbed in its enjoyment by the alleged nuisance. The defendants pleaded that they were possessed of their workshops and manufactory (the nuisance complained of) for ten years before the plaintiff became possessed of his term. The plaintiff replied that the term whereof he held the residus was created four years before the defendants were possessed of their said workshops and manufactory:—Held, on demurrer, that the plea was bad; the defendants should at least have alleged an user for twenty years. *Elliotson v. Beetham*, 174.

Against Carriers for Negligence—see CARRIERS.

Against the Sheriff for taking insufficient Pledges—see SHERIFF, 1.

CHARTER-PARTY—see SHIP AND SHIPPING.

COACH PROPRIETORS—see CARRIERS.

CONDITION PRECEDENT—see TAXES, 3, 4.

CONVEYANCE—see ACT OF PARLIAMENT.

COSTS.

Of a former Trial.

1. The 64th rule of Hilary Term, 2 Will. 4, applies only to cases where a new trial is granted upon the whole record: *Bower v. Hill*, 540.

2. On the trial of a right of way, in one count claimed as a public, and in another as a private way, a general verdict was found for the defendants. The court afterwards directed a new trial, expressly by the rule confining it to the right claimed in the second count. In the rule no mention was made of costs, nor any reservation of the defendant's verdict on the first count:—Held, that the defendants were nevertheless entitled to the costs of the issues found for them on the first trial and without contest on the second, they having succeeded on such second trial, *Id.*

Of Motions and Rules.

3. Where a special case, on which judgment had been given for the plaintiff in this court, was at the instance of the defendant turned into a special verdict, that he might have an opportunity of obtaining the judgment of a court of error thereon, this court, after the lapse of two years, and after the costs of the trial and special case had been taxed and paid, refused to allow the plaintiff the costs thereby occasioned. *Collins v. Gwynne*, 332.

Taxation of Costs.

4. An abstract of a title to an estate sold by auction disclosed a conveyance in fee and a deed assigning terms to attend the inheritance dated in 1737, (shewing some terms outstanding, which occasioned considerable expense), and a perfect title by possession for sixty years:—Held, that the costs thus occasioned were allowable on taxation:—Held, also, that the costs of attested copies of the will of the vendor's father ought not to be allowed. *Ex parte Quick*, 184.

And see ATTORNEY, 4.

Extra Costs.

5. In an action for a vexatious and excessive distress, the plaintiff cannot recover by way of damages the extra costs necessarily incurred by him in a former action of replevin. *Grace v. Morgan*, 790.

Under 43 Geo. 3, c. 48, s. 3.

6. The verdict of the jury is not conclusive as to the amount for which the plaintiff had reasonable cause (within the meaning of the statute) for holding the defendant to bail. *Mantell v. Southall*, 132.

Under 1 & 2 Will. 4, c. 58 (Interpleader Act).

7. The sheriff is entitled to costs under the interpleader act only under very special circumstances. *West v. Rotherham*, 802.

Against Executors and Administrators—see EXECUTORS AND ADMINISTRATORS, 5.

COVENANT.

TRANSFERS

Covenants running with the Land.

1. The defendant and one H., by indenture dated June, 1826, demised and confirmed to the plaintiff the residue of a term of thirty years created by an indenture of August, 1815, to commence on the expiration of a lease for twenty-one years granted by H. in November, 1815, viz. at Christmas, 1836. H. having failed in payment of rent to the lessors pursuant to his covenant in the lease of August, 1815, an ejectment was, in 1825, brought by the lessors, wherein they obtained a judgment under which the plaintiff (who was in possession under the lease of November, 1815) was evicted. In the lease of 1826, the defendant and H. covenanted severally, and not the one for the other of them, that the plaintiff, paying the rent reserved and performing the covenants, should, during the term thereby demised, quietly enjoy the premises, without any let or disturbance of, by, or from the defendant and H. or either of them, &c., or of any person or persons claiming or to claim by, from, or under them, or any of them:—Held, that no action could be maintained against the defendant for a breach of his covenant until the term thereby granted should actually come into existence. *Ireland v. Bircham*, 207.

2. Quere, whether, under this covenant, the defendant would be responsible for the default of H.: or whether the disturbance was by parties claiming by, from, or under the defendant and H., or either of them, within the meaning of the covenant. *Id.*

3. J. S. being possessed of an equitable estate in certain property, by indenture dated in 1762, demised a portion thereof to K. for ninety-eight years at the yearly rent of 5*l.*, and by another indenture of the same date demised other part of the premises to K. for the like term and at the like rent. J. S. having afterwards acquired the legal estate, by indenture dated in 1773—rectifying the two indentures of 1762, and that the parties had come to a further agreement respecting the property, whereby they had agreed that K. should have the whole of the premises leased to him at the yearly rent of 10*l.* only; but, instead of cancelling the two several leases already granted of part, they should remain, and another lease be granted of the residue of the property at the ground-rent of 10*l.*, which rent should be considered the same as the two several rents of 5*l.* each so reserved by the leases of 1762; and that notwithstanding such several reservations no more than 10*l.* per annum in the whole should be payable for the entire premises—demised to K. the whole of the premises except such parts as had already been demised to him by the indentures of 1762, for the same term; K. covenanting for himself, his executors, administrators, and assigns, to pay the rent and keep the premises in repair:—Held, that the assignee of the reversion could not maintain an action of covenant against the assignees of K. for breach of the

COVENANT.

Covenants

Covenants running with the Land—(Continued)

covenants contained in either of the leases of 1762. *Whitton v. Peacock*, 630.

4. In covenant by assignee of lessee against lessor upon a covenant running with the land, the venue was laid in London. At the trial it appeared from the evidence that the land was situate in Surrey:—Held, that, inasmuch as it did not appear upon the record that the venue was laid in the wrong county, the defendant was not entitled to have a nonsuit entered. *Boyes v. Hewetson*, 831.

Personal Covenants.

5. It was agreed between A. and E. (the lessees of the V. Theatre) and the plaintiff, that, in consideration of 313*l.* paid by the plaintiff to A. and E., they would pay the plaintiff 360*l.* on the 31st December, 1834, if all of them and one B. F. should be living on any part of that day; that the plaintiff should till that day, if all of them, A., E., the plaintiff, and B. F., should so long live, or so long during the same period as all of them should live, have the free use of two private boxes in the V. Theatre; that, if all of them, A., E., the plaintiff, and B. F., should be living on any part of the 31st December, 1834, the plaintiff should pay nothing for the use of the boxes; but, if either of them should die before that day, the plaintiff should make such compensation for the use of the two boxes during the time he should have been entitled thereto, as should be just and reasonable:—Held, that this was a mere personal covenant by A. and E. with the plaintiff, and therefore not binding, as to the use of the boxes, on an assignee of the theatre. *Flight v. Glossop*, 220.

CROWN LANDS.

1. By the 57 Geo. 3, c. 97, s. 6, the commissioners of woods and forests are authorized and empowered to contract and agree with any person for the sale of any part or parts of the possessions or land revenues of the crown which shall in their judgment be desirable to be sold, and to give the purchaser a certificate in the form therein prescribed: and it is declared that the purchaser shall, after the enrolment of the certificate, "be deemed to be in actual possession and seisin of the premises, rights, and interests by him purchased, and that he shall hold the same as fully and amply to all intents and purposes as his majesty might have done if such sale had not taken place." In 1803, the defendant inclosed part of the waste of the manor of Iscoed, (part of the demesnes of the crown), and remained in uninterrupted possession of the waste so inclosed until after the year 1826, when the manor of Iscoed was purchased from the crown by the lessor of the plaintiff. The property so purchased by the lessor of the plaintiff was described in the certificate of the commissioners as "all that the manor of Iscoed, with the rights, members, and appurtenances thereto belonging." In ejectment brought by the purchaser to recover

CROWN LANDS—(Continued).

the possession of the waste so inclosed by the defendant:—Held, that it did not pass under this contract of sale; for that the commissioners neither had the power under the statute to make sale of property so inclosed, nor by their certificate affected to exercise such power if they had it. *Doe v. Watt & Morris*, 276.

2. Although the king can never be put out of possession in point of law by the wrongful entry of a subject; yet there may be an adverse possession *in fact* against the crown. Therefore after such an adverse possession by a subject for twenty years, the crown could only recover the land by an information of intrusion; consequently, ejectment would not lie at the suit of the grantee of the crown, notwithstanding the rights of the crown are not barred by the statute of limitations. *Id.*

3. And semble, that, even if the waste land in question had not been out of the actual possession of the crown for twenty years, it would not, under the circumstances, have passed under the word “manor” in the certificate. *Id.*

CUSTOM—see PLEADING, 3, 4.

DEMI-MARK—see WARR OF RIGHT, 10.

DEVASTAVIT—see EXECUTORS AND ADMINISTRATORS, 3.

DEVISE.*Construction of.*

1. T. J. Selby, by his will devised as follows:—“To my right and lawful heir at law (for the better finding out of whom, I direct advertisements to be published immediately after my decease in some of the public papers) all my manors, lands, &c., in B., to hold the aforesaid manors, &c., to my heir at law, his heirs, executors, administrators or assigns, for ever, subject and chargeable with the payment of all my just debts, funeral charges, bonds, annuities, and all legacies hereinafter mentioned [various legacies to relations on his mother's side]: all which debts, legacies, &c., I do hereby order and direct to be paid by the said heir at law, his heir, executor, or assigns, *within twelve months after my decease*; but, should it so happen that no heir at law is found, I do hereby constitute W. Lowndes, of &c., my lawful heir, on condition he changes his name to Selby; and I give the estates and all the manors before mentioned, together with all rights &c. before mentioned, to the aforesaid W. Lowndes, subject to and chargeable with all the legacies, debts, &c., before mentioned:—Held, that, on failure of an heir of the blood of the testator, within the time limited for payment of the legacies, &c., the fee simple vested under this devise in W. Lowndes; and that the condition was satisfied by his changing his name to Selby within a reasonable time, and without a licence from the crown. *Davies, dem., Lowndes, ten.*, 71.

2. Testator devised the residue of his freehold, copyhold, and leasehold estates, &c., to his wife for life; and from and immediately after her decease to his son and daughters, naming them, “and their law-

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and among the takers respectively, as tenants in common, and not as joint tenants." *Held*: that the children of the testator took estates for their respective lives, as tenants in common, in the freehold and copyhold lands; and the grandchildren contingent remainders in tail generally by purchase in the shares of their respective parents in the same lands, with cross-remainders in tail among such grandchildren respectively, and cross-remainders in tail among their parents—the testator having used the words "sons of child or children" as synonymous with "sons or daughters of a child or children;" and that the children and grandchildren respectively took corresponding interests in the leaseholds. *Cursham v. Newland*, 105.

3. Testator devised to W. N., and H. H., and the survivors and survivor of them, and the heirs of each survivor, upon trust to the use of his nephews and their assigns during their lives and the life of the longest liver of them; and, after the determination of those estates by forfeiture or otherwise in the lifetime of his nephews or the survivor of them, to the use of the trustees &c. during the natural lives of his nephews and the life of the survivor, upon trust to preserve the uses thereafter limited from being defeated; but nevertheless to permit and suffer the nephews to take the rents &c. for their own use: and, from and after the decease of the testator's nephews, to the use of their children, their heirs and assigns, as tenants in common, and if only one child, to such child, his or her heirs and assigns for ever: but, in the event of there being no such child, or, there being children of the nephews or such only child, and they or he or she dying in the lifetime of the nephews or the survivor of them without leaving lawful issue, then, from and after the decease of the nephews and the survivor of them—to the trustees and the survivor of them, their heirs and assigns, upon the like trusts, and to and for the same uses, &c., as directed as to the disposal of the testator's residuary real and personal estates and effects [for which see the preceding case]:—Held, that, under this devise, the trustees took an estate in fee in the freehold and copyhold lands, and an absolute interest in the leaseholds. *Cursham v. Newland*, 105.

4. The testator devised leaseholds to trustees, their heirs, &c., in trust to permit and suffer his daughter to receive the rents, &c., for life; remainder to her two eldest sons for life, and, if but one, then wholly to that one; and in case the daughter should not have a son or sons to attain the age of twenty-one, *and such sons dying without lawful issue*, then to her daughters, their executors, &c.; and in case the testator's daughter should die without lawful issue, then over: all the rest and residue of his real and personal estate he gave in trust for his daughter:—Held, that, under this devise, the testator's daugh-

DEVISE.

DEVISE.

Construction of—(Continued.)

Testator took an express estate for life, with a remainder to her two eldest sons, for their lives, with the ultimate remainder in the thirds, on certain contingencies, to herself; and consequently, when on the death of one of those sons without issue, his moiety in the thirds came to his mother, either under the devise over in case of the general failure of issue in her, or, at all events, under the residuary clause of the will. *Bradshaw v. Skilbeck*, 204.

5. Testator devised lands to his cousin T. P. for life, and, from and after the decease of T. P., to such of the testator's relations of the name of Pearce (being a male) as his cousin T. P. should by deed appoint; and, in default of appointment, to such of the testator's relations of the name of Pearce, being a male, as T. P. should adopt, if he should be living at the time of the decease of T. P.; and, in case T. P. should not have adopted any such male relation of the testator, or, in case he should have done so, and there should not be any such male relation living at the decease of T. P., then the testator devised the property to the next or nearest relation or nearest of kin to the testator of the name of Pearce, being a male, or the elder of such male relations in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, &c., for ever. The will also contained a power to T. P. to lease for any term not exceeding seven years. T. P., the tenant for life, died without issue, and without having executed the power of appointment given by the will. The nearest of kin of the testator living at the time of his decease were—first, T. P.; secondly, R. P., the plaintiff; thirdly, W. R., a younger brother of R. P. The testator had a brother named Zachary, who, if living at the death of the testator, would have been his nearest of kin; but it appeared that he went to sea, and was never heard of after 1795. Held, that, assuming Zachary to have died without issue in the lifetime of the testator, T. P. took an estate in fee under the ultimate limitation contained in the will. *Pearce v. Vincent*, 347.

6. A testator possessed of freehold, copyhold, and leasehold property, devised to his wife, M. D., as follows:—"All my freehold and leasehold, and all my money, securities for money, stock in government funds, goods, chattels, and all other my property whatsoever and wheresoever, to hold the same unto and for the use of my said wife M. D., her heirs, executors, administrators and assigns, for ever."—Held, that the copyhold passed under this devise. *Edwards v. Barnes*, 411.

7. Testator devised to his wife and three others, B., C., and D., freehold lands, in trust for his wife for life, and after her decease for the use of his three children for their lives, in equal shares, and to the lawful issue of their respective bodies for their respective lives only,

DEVISE.

Construction of—(Continued.)

in equal shares, for ever; and, in case of the death of either of his said children without lawful issue, then upon trust for the survivors or survivor of them in equal shares for life only, or to their respective lawful issues in equal shares for life only; and, in case there should be only one child then living, then upon trust for such only child for life only, and for the lawful issue of such only child for life, in equal shares; and if but one issue of such child, then to such only child's issue, for life only, and the heirs of his or her body for ever; but, in case there should not be any lawful issue of such child or the child of such child, then over. Either of the testator's children who should marry was to have power to make a settlement of his share, with the consent of his mother, for the lives of the parties and the lives of their issue, with remainder over in tail. By a second codicil annexed to his will, revising the above devise, the testator devised the premises after the decease of his wife to B., C., and D., upon trust, for the equal use of his three children, as tenants in common, for ninety-nine years from the day of his decease, if they or either of them should so long live; and from and after the determination of that term and in the meantime subject thereto, to the trustees in fee, to preserve contingent remainders; with power to the testator's daughter, if unmarried, to devise one third part in fee or for life; and the uses, (subject to those in the codicil declared), which were expressed in the will, as far as the rules of law would permit, were to be carried into perfect execution. By other codicils, G. James and another were appointed trustees in lieu of C. and D. The testator's widow and C. James alone acted in the execution of the trusts of the will; and C. James died in the lifetime of the widow, intestate, leaving an eldest son his heir at law. The testator's daughter died unmarried, and, without any reference to the power given her by the will, devised all her then present and future right and interest in the property in question to her mother. The testator's widow by her will, after various devises and bequests, gave and devised the residue of her estate and effects, both real and personal, equally between her grandchildren:—Held, that, under the will and second codicil, the testator's three children took estates for ninety-nine years, if they should respectively so long live, as tenants in common, with remainder to the trustees therein named and their heirs during the respective lives of the said three children, in trust to preserve contingent remainders, with remainder to the three children as tenants in common in tail general, with cross-remainders between them in tail general:—Held, also, that the legal estate and interest which the widow had as surviving trustee under the will and codicil at the time of making her will, was an estate for life only; and that, upon her death, the legal remainder in fee came to the heir at law of G. James, the last surviving trustee of the fee:—

DEVISE.

Construction of—(Continued.)

Held, also, that the will of the testator's daughter operated as an appointment in exercise of the power over her one third part of the estate. *Brooke v. Turner*, 611.

8. Testator by his will charged an annuity upon certain leasehold premises, with a declaration, that, in case the leasehold specified should prove insufficient to discharge the annuity, the deficiency should be made up out of the rents and profits of his freehold premises. The annuitant distrained upon the freehold for arrears of the annuity. In replevin:—Held, that the will, even as against the annuitant claiming under it, did not dispense with proof that the testator died possessed of the leasehold. *James v. Salter*, 750.

DISCLAIMER.

A devisee in fee may by deed under his hand and seal disclaim an estate devised to him, without a formal disclaimer in a court of record. *Begbie v. Crook*, 128.

DISCONTINUANCE.

After an Award stating the Facts specially.

A cause was referred, and the arbitrator stated the facts specially on his award for the opinion of the court. On the matter coming on for argument, the plaintiffs being advised that one of the defendants was improperly joined in the action—The court permitted them to discontinue, on payment of the costs of the cause (no provision being made for the costs of the reference and award) and of the motion, and undertaking not to bring any joint action against the two defendants, nor any separate action against the defendant so improperly joined. *Turner v. Ison*, 596.

DISTRESS—see ANNUITY, 1, 2—LANDLORD AND TENANT, 4.

ECCLESIASTICAL LAW.

Letters of Administration, by whom granted.

A prerogative administration of goods within a peculiar, is not void at common law, though it might be avoided by sentence of the Ecclesiastical Court. *Lysons v. Barrow*, 721.

EJECTMENT—see CROWN LANDS, 1, 2—EVIDENCE, 3—VENDOR AND PURCHASER.

Service of Declaration and Notice.

1. Service of a declaration in ejectment upon the wife of the son of the tenant in possession on the premises, who at the time of such service informed the party who made the service that the tenant was in America, and that her husband (the son) was transacting the business of the house:—Held, sufficient for a rule nisi. *Doe d. Potter v. Roe*, 378.

Setting aside Judgment.

2. In the absence of any suggestion of collusion between the lessor

EJECTMENT.*Setting aside Judgment—(Continued.)*

of the plaintiff and the tenant, the court will not set aside a regular judgment in ejectment, in order that the landlord may be let in to defend. *Doe d. Thompson v. Ree*, 181.

ESTOPPEL—see *Adversity*, 1—*Bankruptcy*, 2—*Conveyance*, 31

EVIDENCE.

1. In trespass for breaking and entering the plaintiff's close, the defendant pleaded that the close was not the close of the plaintiff:—Held, that evidence of possession was sufficient to entitle the plaintiff to a verdict. *Hearn v. Milward*, 180.

2. In trover against the sheriff, the officer who seized, being called to prove the warrant, stated that he entered on a certain day under a warrant in the usual form, but that he had lost the warrant:—Held, sufficient to exonerate the sheriff. *Moom v. Raphael*, 409.

Of Acts of Bankruptcy—see *BANKRUPT*, 1, 2, 3.

Of Acts of Ownership.

3. In ejectment, the question was whether a slip of land between some ancient inclosures and a highway belonged to the owner of the adjoining land, or to the lord of the manor:—Held, that acts of ownership by the lord (grants of licenses to enclose) over slips skirting the same road, the continuity of which was only broken by a bridge and some ancient tenements, were admissible in evidence. *Doe d. Barrett v. Kemp*, 9.

Of Reversal of Outlawry.

4. In an action on the case for maliciously and without reasonable or probable cause procuring the plaintiff to be outlawed, assigning for special damage that the plaintiff was put to costs in and about reversing the outlawry:—Held, that under not guilty, the reversal of the outlawry was not put in issue: and ~~semble~~, that, if it had been, the rule of court and entry thereof in the officer's book was not evidence of that fact. *Drammond v. Pigou*, 228.

Decrees in Chancery.

5. On the trial of a writ of right, decrees in Chancery in causes between the tenant's father and other persons not connected with the demandants, and to which proceedings the latter were neither parties nor privies, were admitted for the purpose of shewing the character in which the tenant's father held the premises. *Davies, dem.*, *Lowndes*, rep. 90.

Attesting Witnesses to a Will, where dispensed with.

6. In order to dispense with the production of an attesting witness to a will bearing date the 15th May, 1806, it was proved that applications had been made by letter to the attorney in whose office the witness was at the time a clerk, in the first place for general information respecting the will, and afterwards for information respecting the

EVIDENCE.

Attesting Witnesses to a Will, where dispensed with—(Continued.)

witnesses by whom it was attested, and that advertisements for their discovery had a week before the trial been inserted in three daily and one weekly newspaper, but without success:—Held, that sufficient had been done to entitle the party to have the will read on proof of the handwriting of the witnesses—although the attorney of whom the inquiries had been made, stated that one of the witnesses was examined in a cause touching the property in 1815, a fact which he had forgotten to communicate at the time he was asked for information, but which (it was suggested) he could not have failed to remember had any strict inquiry been instituted. *Miller, dem., Miller, ten. 122.*

What may be given in Evidence under Non-assumpsit, &c.

7. In assumpsit against the acceptor of a bill of exchange, part payment may be given in evidence under a plea denying 'the acceptance, in reduction of the damages.' *Shirley v. Jacobs, 157.*

8. Quære whether, in an action on an attorney's bill, a defence that no signed bill has been delivered pursuant to the statute, would avail under non-assumpsit, or must be pleaded specially. *Beck v. Mor-daunt, 178.*

9. In assumpsit for use and occupation of premises into possession of which the defendant entered under an agreement in writing between himself and the plaintiff:—Held, that, under non-assumpsit, the defendant might give in evidence the fact of the plaintiff having mortgaged the premises before his tenancy commenced, and that he had received notice from the mortgagee not to pay rent to the mortgagor; these facts merely amounting to a denial of a matter of fact stated in the declaration from which the promise in law is implied. *Waddilove v. Barnett, 763.*

10. But, held, that the defendant could only under that plea discharge himself as to the rent that became due *after* the notice: as to the by-gone rent, the matter must be pleaded specially. *Id.*

11. In assumpsit for board and lodging furnished to the defendant's wife—Quære whether under non-assumpsit evidence could properly be given of the wife's adultery. *Symes v. Goodfellow, 769.*

And see ANNUITY, 1—EXECUTORS AND ADMINISTRATORS, 2, 3—LIBEL, 1—LIMITATION OF ACTIONS—RIGHT OF WAY—SLANDER, 3, 4—WITNESS.

EXECUTORS AND ADMINISTRATORS.

Administration, by whom granted.

1. A prerogative administration of goods within a peculiar is not void at common law, though it might be avoided by sentence of the Ecclesiastical Court. *Lysons v. Barrow, 721.*

Exhaustion of Assets.

2. To a declaration on two promissory notes made by a testator, his executrix pleaded that she had not at the time of the commence-

EXECUTORS AND ADMINISTRATORS.

Exhaustion of Assets—(Continued.)

ment of the action, or at any time since, any goods or chattels which were of the testator at the time of his decease, in her hands as executrix to be administered—omitting the usual averment that she had fully administered. The plaintiff in his replication took issue on the defendant's possession of assets:—Held, that, under this issue, it was competent to the defendant to give in evidence payments made by her before the commencement of the action, to exhaust the assets shewn to have come to her hands. *Reeves v. Ward*, 390.

Proof of Devastavit.

3. In debt upon a judgment by default against the defendant as executor, suggesting a devastavit, the plaintiff gave in evidence the record in the original action, and a testatum *fi. fa.* thereon, with the sheriff's return that he had caused to be levied the costs *de bonis propriis* of the defendant, and that the defendant had no goods or chattels of the testator in his hands to be administered:—Held, that this was *prima facie* evidence of a devastavit. *Leonard v. Simpson*, 335.

Judgment on Plea of plene administravit præter.

4. On a plea of *plene administravit præter*, the plaintiff is entitled to judgment of assets in futuro for debt and costs. *Cox v. Peacock*, 125.

Liability to Costs under the 3 & 4 Will. 4, c. 42, s. 31.

5. In an action by an administrator on a bond given by the defendant to the intestate more than twenty years ago, and on which no interest appeared to have been paid for many years, the defence was that the defendant had been discharged under the insolvent debtors act. The defendant having obtained a verdict, the court declined to relieve the plaintiff from costs under the statute 3 & 4 Will. 4, c. 42, s. 31, notwithstanding the defendant's schedule was not to be found in the office of the court—it appearing that, had the plaintiff made due search and inquiry, he would have discovered from the register book and the minute book of the clerk of the court for the time being, that the defendant had obtained his discharge. *Engler v. Twysden*, 427.

And see ACCOUNT STATED.

EXTRA COSTS—see COSTS, 5.

FALSE JUDGMENT—see PRACTICE, 20, 21.

FINES AND RECOVERIES—see ACKNOWLEDGMENT.

FLEET PRISON.

Internal Regulation of.

By a rule of court of Hilary Term, 3 Geo. 2, the warden of the Fleet prison is directed to provide a confined room or dungeon for the confinement of persons endeavouring to make their escape, or guilty of any other misdemeanor—"that the general quietness and

FLEET PRISON.*Internal Regulation of—(Continued).*

liberty of the rest of their fellow prisoners may not be restrained or suffer thereby." A warrant from the Lord Mayor for the apprehension on a charge of forgery of a prisoner in execution in the Fleet being lodged at the door of the prison, the warden caused the party to be placed in the strong room :—Held, that this was no excess of authority. *Osborne v. Angle*, 500.

FOREIGN LAW.*Prescription and Limitation of Actions.*

1. The distinction between that part of the law of the foreign country where a personal contract is made which is adopted, and that which is *not* adopted by our courts, is—that so much of the law as affects the rights and merits of the contract, all that relates *ad decisionem litis*, is adopted from the foreign country—so much of the law as affects the remedy only, all that relates *ad litem ordinationem*, is taken from the *lex fori* of that country where the action is brought. In the interpretation of this rule, the time of limitation of the action is governed by the law of the country where the action is brought, and not by the *lex loci contractus*. *Huber v. Steiner*, 304.

2. By the 189th article of the Code de Commerce, it is declared that "all actions relative to letters of exchange and to bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, are prescribed (*se prescrivent*) by five years—if the debt has not been acknowledged by an '*acte séparé*:' nevertheless the supposed debtors shall be held, if required, to affirm upon oath that they are no longer indebted; and their widows, heirs, or representatives, that they bona fide believe that there is nothing more due :—"Held—first, that this prescription merely operates in bar of the remedy, and not as an extinguishment of the right or contract itself—secondly, that a special plea setting up this prescription as an absolute bar, without qualification, was bad, the article containing an exception, that the debt is not "acknowledged by an *acte séparé*." *Id.*

FORGERY—see **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 2.

GOODS SOLD AND DELIVERED.

The defendant indorsed and delivered to the plaintiff, in payment for goods, a promissory note made by one H. payable to R. & W. (without the words "or order"), and indorsed by R. & W. to K., and by K. to the defendant. The note being dishonored by the maker :—Held, that the plaintiffs were entitled to sue the defendant for the original consideration, notwithstanding no notice of the dishonor had been given—the instrument not being negotiable. *Plimley v. Westley*, 423.

GRAND CAPE—see **WRIT OF RIGHT**, 3.

HEREDITAMENTS—see **TITHES**, 2.

INCLOSURE ACT.

One G. was let into possession of land allotted to one P. under an in-

INCLOSURE ACT—(Continued.)

closure act in 1814, upon a contract of sale under which one half of the purchase money was paid, and interest upon the remaining moiety regularly till the year 1828, when G. became bankrupt. No conveyance was ever executed, nor was the remainder of the purchase money ever paid:—Held, that the possession by F. under his inchoate contract was not adverse to the title of P., the vendor; and that the assignee of P. might maintain ejectment notwithstanding the lapse of twenty years from the time possession was first given:—Held, also, that it was not competent to G., or to one claiming under him, to contest the title of P. by reason of the want of an award by the commissioners under the act. *Doe d. Milburn v. Edgar*, 732.

INNUENDO—see **SLANDER**, 3.

INSOLVENT DEBTOR—see **EXECUTORS & ADMINISTRATORS**, 5—**PRISONER**.

INSPECTION OF PAPERS—see **PRACTICE**, 16.

INSURANCE.

What a Stranding within the Exception in the Policy.

Goods were insured upon a voyage from G. to R. "including risk of craft to and from the ship," the risk to continue "until they should be discharged and safely landed," and "free of particular average unless the ship should be stranded." Arrived at R. the goods were put on board a lighter for the purpose of being landed. The lighter was stranded, and an average loss was in consequence sustained:—Held, that this loss was not covered by the policy. *Hoffman v. Marshall*, 559.

INTEREST.

Where recoverable.

1. Independently of the 3 & 4 Will. 4, c. 42, s. 28, interest is not recoverable in an action for money had and received. *Fruhling v. Schroder*, 143.

2. Therefore, where A. consigned goods to B., with directions to remit the proceeds to C., to which B. assented:—Held, in an action for money had and received by C. against B., that interest was not recoverable (there having been no notice that interest would be claimed), although by the course of dealing between A. and B. interest would have been payable as between them. *Id.*

What a sufficient Demand of Interest under the 3 & 4 Will. 4, c. 42, s. 28.

3. The service of the writ of summons in an action on a promissory note payable (without interest) on demand, is a sufficient demand to entitle the plaintiff to recover interest from the date of such service. *Pierce v. Fothergill*, 334.

INTERPLEADER ACT—see **PRACTICE**, 14, 15.

INVESTIGATION OF TITLE—see **COSTS**, 4.

IRREGULARITY—see **PRACTICE**.

LANDLORD AND TENANT.

Title of Landlord.

1. In *assumpsit* for use and occupation of premises into possession of which the defendant entered under an agreement in writing between himself and the plaintiff:—Held, that, under non *assumpsit*, the defendant might give in evidence the fact of the plaintiff having mortgaged the premises before his tenancy commenced, and that he had received notice from the mortgagee not to pay rent to the mortgagor; these facts merely amounting to a denial of a matter of fact stated in the declaration from which the promise in law is implied. *Waddilove v. Barnett*, 763.

2. But, held, that the defendant could only under that plea discharge himself as to the rent that became due *after* the notice: as to the by-gone rent, the matter must be pleaded specially. *Id.*

3. The defendant was let into possession of premises under J. S. and paid rent. J. S. afterwards entered into an agreement to grant a lease of the premises to B., who received from the defendant a quarter's rent: the agreement being rescinded:—Held, that the defendant was at liberty to shew that fact in answer to an action for use and occupation at the suit of B. *Brook v. Briggs*, 803.

Distress for Rent.

4. The statute Westminster 2, c. 37, which provides that "no distress shall be taken but by bailiffs sworn and known," does not apply to distresses for arrears of rent. *Begbie v. Hayne*, 193.

LEGACY DUTY.

By whom payable.

The testatrix, after giving several legacies, the duty upon which she directed her executors to pay, devised and bequeathed the residue of her estate both real and personal to certain trustees, in trust, in the first place "to pay off and discharge all debt and debts" of her first husband that could be satisfactorily proved against him, as it was her "will and desire that the same should be discharged." After the death of the testatrix, a bill was filed in Chancery in order to ascertain the debts payable under this devise. In the result, the defendant's claim, amongst others, was allowed, and paid by the executors. The plaintiffs (the executors) were afterwards called upon to pay to the stamp-office the legacy duty upon the sum so paid to the defendant:—Held, that they were entitled to recover the amount of such duty in an action for money paid to the defendant's use— notwithstanding the statute 36 Geo. 3, c. 52, s. 25. *Foster v. Ley*, 438.

LIBEL.

1. A declaration for libel contained an averment that the plaintiff had been appointed and was assistant overseer of the parish of R., and made out and passed certain accounts of him the plaintiff as such assistant overseer, the same containing amongst other things an account of the receipts and

LIBEL—*(Continued.)*

disbursements of the plaintiff as such assistant overseer, and which said accounts the plaintiff had verified on oath. The libel consisted of a memorandum written at the foot of the accounts, charging the plaintiff with perjury in the verification of them. At the trial it was proved that the plaintiff had acted as assistant overseer under a warrant of appointment by justices pursuant to the 59 Geo. 3, c. 12, by which he was empowered to execute all the duties appertaining and incident to the office of the ordinary overseer; and that the accounts in question were headed "*overseers' accounts,*" but were in fact the accounts of and kept by the assistant overseer:—Held, that the allegation was sufficiently proved—the plaintiff not being bound to shew that all the steps anterior to the warrant for his appointment had been regularly taken, it being part of his duty as assistant overseer to verify the accounts, and the accounts being in reality his accounts. *Cannell v. Curtis*, 379.

2. In an action for a libel, the defendant cannot, either in bar of the action or in mitigation of damages, give in evidence other libels published of him by the plaintiff, unless such libels are of a prior date and relate distinctly to the subject matter of the libel declared on. *Tarpley v. Blaby*, 642.

3. To prove the publication by the defendant of a libel on the plaintiff contained in a letter printed in a newspaper, a manuscript of the defendant, through several passages of which the editor had before it was composed drawn his pen, was produced. The printed libel, being also produced, was found to correspond exactly with the unobliterated parts of the manuscript. The portions of the manuscript through which the pen was drawn were of a more libellous tendency than the parts published in the newspaper, and did not in any degree qualify them:—Held, that the manuscript was receivable in evidence, the portions that corresponded with the printed libel to prove the publication by the defendant, and the residue to shew quo animo that libel was published. *Id.*

4. Held, also, that a letter addressed by the defendant to the plaintiff about the same period, containing expressions similar to those found in the printed libel, was also admissible to shew quo animo the libel was published. *Id.*

LIEN.

1. The plaintiff, having purchased certain timber growing on the land of B., felled it, and afterwards sold it to one J. at a certain price per cubic foot, J. to be at liberty to convert the timber on the land. The trees were marked and measured by J., the number of cubic feet in each tree being ascertained, but the total contents were not summed up. Some of the trees were taken away by the purchaser:—Held, that the transfer of the whole was complete, and consequently that the vendor had no right of lien for the unpaid price of the timber. *Tansley v. Turner*, 238.

2. The defendants were the proprietors of a scribbling and fulling mill, and were employed by H. & Co. (amongst others) to scribble and full wools and cloths, under a stipulation that "all goods on hand" should be subject

LIEN—(Continued.)

to a lien for a general balance. H. & Co. dyed their wools on the defendants' premises, and kept there a quantity of oil and dye-woods—the oil being there for the purpose of being used as required by the defendants' servants in the process of scribbling, but kept locked up, and delivered out in small quantities by a servant of H. & Co.—and the dye-woods to be used by H. & Co. in dyeing the wools in an intermediate stage of the process of scribbling:—Held, that the oil and dye-woods were not subject to lien. *Cumpston v. Haigh*, 684.

LIMITATION OF ACTIONS.

Acknowledgment to take a Case out of the Statute.

1. To take a case out of the statute of limitations, the plaintiff gave in evidence letters wherein the defendant stated that he would have nothing to do with the plaintiff's claim, that he wished he would make him a bankrupt, and that he would rather go to gaol than pay the plaintiff in preference to other of his creditors who had executed a composition deed. The judge left it to the jury to say whether the letters contained an acknowledgment of the debt, telling them, that, to entitle the plaintiff to recover, it must be such an acknowledgment whence a promise to pay could be inferred. The jury having returned a verdict for the defendant—The court declined to disturb it, holding the direction to be proper. *Linley v. Bonsor*, 399.

Part Payment.

2. To shew a part payment within six years so as to bring the case within the exception in the statute, the plaintiff proved a payment of a portion of his demand by one F., the trustee under a deed of composition, who was expressly instructed to make the payment as a full satisfaction, instead of which he handed over the money as a part payment, and took a receipt accordingly. This payment so made was expressly repudiated by the defendant:—Held, that this was not a payment within the exception. *Linley v. Bonsor*, 399.

And see **ANNUITY**, 1, 2—**FOREIGN LAW**.

LOCAL ACTION.

In covenant by assignee of lessee against lessor, upon a covenant running with the land, the venue was laid in London. At the trial it appeared from the evidence that the land was situate in Surrey:—Held, that, inasmuch as it did not appear upon the record that the venue was laid in the wrong county, the defendant was not entitled to have a nonsuit entered. *Boyes v. Hewetson*, 831.

LORDS' ACT—see **PRISONER**, 1, 2, 3.

MANOR.

What passes under the Word "Manor" in a Grant—see **CROWN LANDS**.

MAYOR'S COURT.

Bail on Removal of Cause from.

On the removal of a cause by certiorari from the Lord Mayor's

MAYOR'S COURT.

Bail on Removal of Cause from—(Continued.)

Court, the defendant is not at liberty, under the 7 & 8 Geo. 4, c. 71, s. 2, to pay money into court in lieu of putting in and perfecting special bail. *Morgan v. Pebrer*, 854.

MEMORANDA, 346, 610, 855, 856.

MISDIRECTION—see NEW TRIAL.

MONEY HAD AND RECEIVED.

Where maintainable.

J. & Co. of Rio consigned coffee to the defendants, with directions to remit the proceeds to the plaintiffs, and advised the latter of their having done so. The plaintiffs thereupon wrote to the defendants, requesting to be informed of the probable amount of the remittance. The defendants in answer merely stated that they had received the coffee with directions to remit the plaintiffs the proceeds, but that they had not yet disposed of it. *J. & Co.* having failed, the defendants retained the greater part of the proceeds of the coffee in satisfaction of a balance due to themselves from *J. & Co.* :—Held, that the plaintiffs were entitled to recover the whole in an action for money had and received. *Fruhling v. Schroder*, 135.

Interest in Action for—see INTEREST, 1.

Bankrupts' Estate—see BANKRUPT, 5, 6.

MORTGAGE—see LANDLORD AND TENANT, 1, 2.

NAME.

Changing—see DEVISE, 1.

NEW TRIAL.

For Misdirection.

1. That the judge in his summing up omits specifically to leave to the jury a point made in the course of the trial (his attention not being expressly called to it), is no ground for a motion for a new trial, if the whole of the case was substantially left to them. *Robinson v. Gleadow*, 250.

2. In an action for maliciously and without reasonable or probable cause charging the plaintiff with felony before a magistrate, it appeared that the plaintiff had lived in the service of the defendant, and on being discharged took away with her a trunk and bag, the property of the defendant; that, on the following day, the defendant wrote to desire the plaintiff to return those articles, and stating that unless she did so he would on the Monday following cause her to be apprehended; that, the letter being, in consequence of the plaintiff's absence, unanswered, the defendant obtained a warrant for the apprehension of the plaintiff, and carried her before a magistrate, who dismissed her, the defendant declining to press the charge. The judge before whom the cause was tried left it to the jury to say whether or not the defendant had reasonable or probable cause for apprehending the plaintiff,

NEW TRIAL.

For Misdirection—(Continued.)

and whether he was actuated by malice or not:—Held, that this direction was proper, and that the judge was not bound to take upon himself to decide as to whether or not there was reasonable or probable cause—it being a mixed question of law and fact. *Macdonald v. Rooke*, 359.

3. Where the plaintiff's counsel stops the judge in the course of his summing up, because his opinion appears to be strongly adverse, and elects to be nonsuited, he cannot afterwards move for a new trial. *Simpson v. Clayton*, 691.

4. In trover for chalk dug by the defendant from the waste of the plaintiff's manor and converted by the defendant into lime, it appeared that the plaintiff's bailiff had demanded payment for the chalk, but whether as *rent* or not the evidence was conflicting. The judge not having left it to the jury to say whether or not the defendant held the land at a rent—The court directed a new trial. *Williams v. Plumridge*, 799.

Costs on—see *COSTS*, 1, 2.

NONSUIT—see *LOCAL ACTION*.

NOTICE.

Of Trial—see *PRACTICE*, 18, 19.

Of Dishonor of Bill—see *BILLS OF EXCHANGE AND PROMISSORY NOTES*, 3.

To dispute Trading, &c.

A plea of denial of bankruptcy (under the new rules) does not dispense with the necessity of the notice to dispute required by the 6 Geo. 4, c. 16, s. 90. *Moon v. Raphael*, 489.

NUISANCE—see *CASE*, 3, 4.

OUTLAWRY—see *EVIDENCE*, 4.

OVERSEER—see *LIBEL*, 1.

PART PAYMENT—see *EVIDENCE*, 7—*LIMITATION OF ACTIONS*, 2.

PARTNERS.

What constitutes a Partnership.

It was agreed between the plaintiff and defendant that the former should convey by horse and cart the mail from N. to B., and receive 9*l.* per mile per annum, by quarterly payments—provided always that the said agreement in that and every subsequent article should be punctually and properly fulfilled: and it was further agreed that the plaintiff should pay to the defendant 18*l.* for one cart then in use for the above purpose, and should also pay a proportion of repairs of carts; and that the monies received for the conveyance of parcels should be equally divided, each party bearing an equal portion of the loss, if any, occasioned by loss or damage of such parcels:—Held, that this agreement constituted a partnership between the plaintiff and defendant, and that the mileage was an item in the partnership accounts. *Green v. Beesley*, 164.

PAYMENT OF MONEY INTO COURT.

In Lieu of Bail—see MAYOR'S COURT.

Debt and Costs—see PRACTICE, 10.

On Plea of Tender or Payment.

There cannot be a partial appropriation to a plea either of tender or of payment, of money paid into court in lieu of bail. *Balls v. Stafford*, 426.

PECULIAR JURISDICTION—see EXECUTORS AND ADMINISTRATORS, 1.

PLEADING.

ASSUMPSIT.

Pleas in Bar.

1. A plea to an action on an attorney's bill, that no signed bill has been delivered pursuant to the statute, is not a plea to the merits. *Beck v. Mordaunt*, 178.

2. By the 189th article of the Code de Commerce, it is declared that "all actions relative to letters of exchange and to bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, are prescribed (se prescrivint) by five years—if the debt has not been acknowledged by an '*acte séparé*:' nevertheless the supposed debtors shall be held, if required, to affirm upon oath that they are no longer indebted; and their widows, heirs, or representatives, that they bona fide believe that there is nothing more due:"—Held, that a special plea setting up this prescription as an absolute bar, without qualification, was bad, the article containing an exception, that the debt is not "acknowledged by an *acte séparé*." *Huber v. Steiner*, 304.

3. Quære how far a defendant may by his plea vary the terms of a written contract by the introduction of the custom and usage of the trade? *Whittaker v. Marson*, 581.

As to what may be given in Evidence under Non-assumpsit—see EVIDENCE, 7—11.

Replications.

4. In assumpsit upon a contract of sale of certain books to the defendant under certain special conditions set out in the declaration, the defendant pleaded in bar, that the books were sold to him upon the conditions set out in the declaration, but subject and according to the usage and course of dealing observed amongst booksellers in London, by which usage and course of dealing, as stated in the plea, a material variation was made in the terms of the contract declared on, concluding with a verification. The plaintiff replied generally, that the defendant of his own wrong, and without the cause by him in his plea alleged, committed the breach of promise in the declaration mentioned, modo et formâ, concluding to the country:—Held, on special demurrer, that this

PLEADING.

ASSUMPSIT.

Replications—(Continued.)

replication was informal and insufficient, even supposing the general replication de injuriâ to be applicable to an action of assumpsit; for, it did not admit the promise and excuse the non-performance of it, but in effect denied that the promise was ever made. *Whittaker v. Marson*, 567.

5. The general replication de injuriâ may be pleaded in assumpsit in answer to a plea consisting merely of matters of excuse. *Griffin v. Yates*, 845.

6. The plaintiff declared upon an agreement whereby the plaintiff agreed to buy and the defendant agreed to sell a horse to the plaintiff for 200*l.* provided he trotted eighteen miles within one hour, within one month from the date of the agreement, and J. N. to be the judge of the performance; and if the task was not performed, the horse was agreed to be thereby sold to the plaintiff for one shilling—averring that the horse was tried by the defendant in the presence of J. N., and failed. The defendant pleaded amongst other things, that the horse could and would have trotted the required distance within the hour, but *one A. B., then being the servant of the plaintiff, wrongfully and wilfully as the servant and agent of the plaintiff, interrupted the trotting of the horse, &c.* The plaintiff replied, that A. B. did not, as the servant or agent of the plaintiff, interrupt the trotting of the horse, &c.:—Held, that the allegation in the plea was properly traversed. *Brogden v. Marriott*, 703.

7. The defendant further pleaded, that, after the trial in the declaration mentioned, and within one month from the date of the agreement, to wit, on &c., he was ready and willing to try the horse, and gave reasonable notice to the plaintiff and J. N. of such intended trial, and of the time and place at which the same was to take place; and that J. N. was requested by the defendant to be the judge of the performance at such trial; but that J. N. then and at all times afterwards during the month refused to attend; whereby the horse was prevented from trotting in the presence of J. N. eighteen miles within the time limited:—Held ill, on special demurrer: for that, inasmuch as the condition the performance of which was to entitle the defendant to the advanced price was a condition for his benefit, the onus of procuring its performance rested upon him. *Id.*

CASE.

Declarations—see CASE, 2, 4—SLANDER, 2, 3.

Pleas—see CASE, 4—SLANDER, 5, 6.

DEBT.

8. To a count in debt by the assignees of a bankrupt for money had and received by the defendant to the use of the plaintiff as assignees

PLEADING.

DEBT—(*Continued.*)

(not stating whether received before or since the bankruptcy), the defendant pleaded a set-off for money due to him on an account stated with the bankrupt before his bankruptcy:—Held, that the plea was bad, for that it did not shew that the debts were mutual. *Groom v. Mealey*, 171.

And see PRACTICE, 20.

TRESPASS.

9. In trespass for breaking and entering the plaintiff's close, the defendant pleaded that the close was not the close of the plaintiff:—Held, that evidence of possession was sufficient to entitle the plaintiff to a verdict. *Heath v. Milward*, 160.

In Actions by or against particular Persons—see EXECUTORS AND ADMINISTRATORS, 2.

Time for pleading—see PRACTICE, 12.

As to Amendment of Pleadings—see AMENDMENT.

PLENE ADMINISTRAVIT—see EXECUTORS AND ADMINISTRATORS, 4.

POWER.

Of Appointment—see DEVISE, 7.

PRACTICE.

Process.

1. In a *capias* into London, the direction to return the writ was addressed to "the said sheriff."—Held, no ground for setting aside the writ. *Irving v. Eaton*, 798.

2. In the indorsement on a writ of summons, the residence of the attorney stated thus—"No. 1, Clifford's Inn Passage, Fleet Street, in the city of London," without mentioning the parish—is sufficient. *Arden v. Garry*, 186.

3. A *distringas* to compel appearance cannot issue after the expiration of the writ of summons. *Lemon v. Lemon*, 506.

Payment of Money into Court in Lieu of Bail.

4. On the removal of a cause by *certiorari* from the Lord Mayor's Court, the defendant is not at liberty under the 7 & 8 Geo. 4, c. 71, s. 2, to pay money into court in lieu of putting in and perfecting special bail. *Morgan v. Pebrer*, 854.

Time for moving for Irregularity.

5. An objection to the regularity of the writ of summons (in right) was first taken on the 24th April, as the knights were about to be sworn. The court directed the tenant to make a substantive motion on the subject. The motion was not made until the 12th May:—*Tindal, C. J.*, and *Park, J.*, seemed to think the motion too late. *Miller, dem.*, *Miller*, ten. 116.

6. The defendant was arrested on the 12th May, carried to gaol on

PRACTICE.

Time for moving for Irregularity—(Continued.)

the 15th, and a declaration delivered on the 20th:—Held, that an application on the 4th June to discharge him out of custody on the ground that he had been carried out of the county and there detained two days before he was taken to the county gaol, was too late. *Fownes v. Stokes*, 205.

7. Semble that the 33rd rule of Hilary Term, 2 Will. 4, as to the time for moving on the ground of irregularity does not apply with equal strictness to the case of a prisoner as to that of a defendant at large. *Taylor v. Slater*, 839.

8. Where a defendant is held to bail or detained by virtue of a judge's order, he is not bound to apply either to the same or to another judge at chambers, to rescind the order, or to discharge him from custody, on the ground of defects in the affidavit of debt: the application is properly delayed till the court is sitting. *Johnston v. Kennedy*, 410.

Setting aside and staying Proceedings.

9. In the absence of any suggestion of collusion between the lessor of the plaintiff and the tenant, the court will not set aside a regular judgment in ejectment, in order that the landlord may be let in to defend. *Doe d. Thompson v. Roe*, 181.

10. To entitle a defendant to a stay of proceedings on payment of the debt and costs indorsed on the writ, under reg. II. of Hilary Term, 2 Will. 4, such payment must be made within the four days limited by the rule. *Bowdidge v. Slaney*, 197.

11. The plaintiff delivered to the defendant as solicitor for one N., a bill for goods sold, making (as the defendant alleged) N. his debtor, and afterwards surreptitiously withdrew it and substituted another, making the defendant his debtor. In an action against the defendant for the amount, the court ordered the proceedings to be stayed until the plaintiff should have delivered a copy (the original having been destroyed) to the satisfaction of the prothonotary. *Edgington v. Nixon*, 507.

Time for pleading.

12. The declaration was delivered on the 12th January, with notice to plead in four days; on the 13th the defendant obtained a judge's order for "seven days' time to plead," upon an undertaking to accept short notice of trial for the last Sitting in the term, the 26th:—Held, that the seven days commenced from the date of the order, and not from the expiration of the four days. *Simpson v. Cooper*, 840.

Striking out Demurrer.

13. The court refused at the instance of the plaintiff, to allow a demurrer to be struck out of the paper, on the ground that, since it had been set down, the defendant had become bankrupt, and his assignees refused to take up the defence or to give security for costs. *Flight v. Glossop*, 223.

PRACTICE—(Continued.)

Motions under the Interpleader Act, 1 & 2 Will. 4, c. 58.

14. Against a rule obtained by the sheriff under the interpleader act—Held, that cause may be shewn at chambers. *Haines v. Disney*, 183. Sed quære.

15. The court has no power to order rules made under the interpleader act, 1 & 2 Will. 4, c. 58, to be entered in any other manner than as pointed out by the 7th section, viz. according to their true date. *Lambirth v. Barrington*, 263.

As to costs on motions under this act—see *Costs*, 7.

Inspection of Documents.

16. By a canal act, it was provided that the directors should keep books, and that the proprietors, land-owners, and others interested in the navigation, should be at liberty to inspect the company's books:—Held, that a bond-creditor was entitled to such inspection, to enable him to meet the defence intended to be set up by the company in an action upon the bond. *Pontet v. The Basingstoke Canal Co.* 543.

Delivery of Issue.

17. In causes to be tried before the sheriff, the issue must be delivered as in other cases. *Arden v. Garry*, 188.

*Notice of Trial.**At Nisi Prius.*

18. Where there were several pleas, on some of which issue was joined, and as to one a demurrer upon which judgment was given for the defendant four days before the end of Easter Term—The court refused to allow the defendant to sign judgment as in case of a nonsuit in Trinity Term, on the ground of the want of a notice of trial for the adjournment day of the Sittings after Easter Term. *Leslie v. Guthrie*, 331.

Before the Sheriff.

19. That a notice of trial before the sheriff is given for a day not fixed for trying issues, is no ground for moving to set it aside. *Arden v. Garry*, 188.

Signing and entering Judgment.

20. To debt in a county court for 33s., the defendant pleaded nil debet except as to 1*l.* 12s. 5*d.*, and as to that sum a tender. The jury found that the defendant did not owe anything except as to the 1*l.* 12s. 5*d.*, and, as to that sum, they found specially certain facts upon which judgment was entered for the defendant in the county court. Upon a writ of false judgment, this court reversed the judgment of the court below, holding that the circumstances found by the jury did not amount to a tender. The court allowed the plaintiff to enter up judgment for the debt and also for the costs in the court below, to be taxed by the prothonotary. *Finch v. Brook*, 511.

21. The costs having been taxed and an allocatur signed upon the

PRACTICE.

Signing and entering Judgment—(Continued.)

rule, the plaintiff sued out a writ of fi. fa. and levied thereunder the debt and costs. The court ordered it to be set aside, no judgment having been entered up or signed to warrant it. *Ib.* 517.

Judgment as in Case of a Nonsuit.

22. In answer to a rule for judgment as in case of a nonsuit, the plaintiff's attorney swore that *he* had not added the similitur, nor had it been added to his knowledge or belief:—Held, a sufficient answer. *Martin v. Martin*, 389.

And see pl. 18.

See also AMENDMENT—ARREST—SCIRE FACIAS.

PREROGATIVE ADMINISTRATION—see ECCLESIASTICAL LAW.

PRESUMPTION—see TAXES, 5.

PRISONER.

Assignment under the Lords' Act.

1. In ejectment, where the lessor of the plaintiff claims title under an assignment for the benefit of creditors under the lords' act, 32 Geo. 2, c. 28, ss. 16, 17, it seems that the assignment indorsed on the schedule and the rule for the prisoner's discharge are sufficient to establish the title of the lessor of the plaintiff: at all events, it is not necessary to prove the steps preliminary to bringing the prisoner before the court; the rules of court under which he was brought up and remanded can alone be required. *Doe d. Milburn v. Edgar*, 581.

2. An incorrect or over large statement of the trusts of the assignment will not vitiate the instrument: probably, an entire omission to state any trusts would not have that effect. *Id.*

3. *All* the prisoner's property passes under the general words of the assignment, and not merely that which is specifically pointed out in the schedule. *Id.*

Motion for Discharge of, from irregular Custody.

4. Semble that the 33rd rule of Hilary Term, 2 Will. 4, as to the time for moving on the ground of irregularity, does not apply with equal strictness to the case of a prisoner as to that of a defendant at large. *Taylor v. Slater*, 839.

But see *Fownes v. Stokes*, 205.

PRIVITY OF CONTRACT—see MONEY HAD AND RECEIVED.

PROMISSORY NOTES—see BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROMOTIONS,

PROTHONOTARY.

Practice on Reference to.

1. Upon a reference to the prothonotary to ascertain a disputed fact, a party cannot after a term has elapsed since the determination of the prothonotary was pronounced, have the matter referred back

PROTHONOTARY.

Practice on reference to—(Continued.)

to him to be re-heard, on the ground that an absent witness has since been discovered. *Edgington v. Nixon*, 509.

2. Upon a reference to the prothonotary to inquire into the circumstances attending the settlement of an action, the prothonotary reported that the settlement was fraudulent as against the plaintiff, stating some of the facts that led him to that conclusion. On motion to confirm the report:—Held that it was not competent to the counsel on the other side to impeach the facts found by the prothonotary, though they were at liberty to dispute his deductions therefrom. *Corry v. Wharton*, 664.

3. Semble that such a report should be in writing. *Id.*

REFERENCE.

To Arbitration—see ARBITRATION.

To the Prothonotary—see PROTHONOTARY.

REGULÆ GENERALES.

Hilary, 3 Geo. 2. . . Fleet prison—Rule for regulation of, 500.

Easter, 51 Geo. 3. . . Practice—Notice of trial, 231.

Hilary, 2 Will. 4, r. II. Practice—Indorsement on process of debt and costs, 197, 205.

Hilary, 4 Will. 2, r. 33. Practice—Time for moving for irregularity, 116, 839.

r. 64. Costs—New trial, 540.

Easter, 2 Will. 4. . . Easter Holidays, 116.

Hilary, 4 Will. 4, r. 2. Demurrer—Points to be stated in margin, 708.

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Assumpsit, I. What may be given in evidence under non assumpsit, 157, 178, 763, 769.

Trespass, V. Effect of not guilty, 160.

Sched. Forms of issues &c. on trials before the sheriff, 188.

Hilary, 6 Will. 4. . . Holidays, 116.

RENT-CHARGE—see ANNUITY, 1, 2.

REPLEADER.

A replader cannot be awarded in a court of error. Per Bolland, B., in *Gwynne v. Burnell*, 44.

REPLEVIN—see ANNUITY, 1—SHERIFF, 1.

RIGHT OF WAY.

1. A right of way claimed by the plaintiff, by reason of his possession of a close, from the said close unto and along a stream or watercourse into a navigable river, for himself and his servants to pass and repass in boats &c., is not supported by evidence of an user of the way by the occupier of an inn and yard held as one entire subject, from which yard the plaintiff's close had recently been severed. *Bower v. Hill*, 535.

RIGHT OF WAY—(*Continued.*)

2. Quære, whether such a claim, even by the occupier of the entire premises, would be sustained by proof that goods were brought to the inn along the watercourse in boats not belonging to the occupier, or navigated by his servants properly so called? *Id.*

Obstruction of—see CASE, 3.

RIGHT, WRIT OF—see WRIT OF RIGHT.

SALE.

*Of Goods.**Transfer, where Complete.*

1. *Le C.*, a trader in Guernsey purchased goods of the plaintiffs, directing them to be forwarded to him at Guernsey. The goods were accordingly sent by waggon to Southampton—addressed "*J. Le C.*, Guernsey, care of *W. S. Le F.* (the defendant), Southampton." The goods arrived at Southampton on the 10th May, and were taken from the waggon-office by the defendant, who was the general shipping agent of *Le C.* at that port, and who paid the carriage, and shipped them for Guernsey on the 14th. On the 15th, a letter from *Le C.* to the defendant (written at the plaintiffs' request) was received by the clerk of the defendant at Southampton, requesting the defendant to delay the shipment of the goods; and on the same day one of the plaintiffs arrived there for the purpose of stopping the goods—the vendee being insolvent and in prison. Arrived at Southampton, the plaintiff went with the defendant's clerk on board the vessel in which the goods were, and caused them to be re-landed and conveyed to the defendant's warehouse; the defendant's clerk giving the plaintiff a letter wherein he engaged on the defendant's behalf to hold the goods subject to the order of the owners:—Held, that the transitus of the goods was not ended on their arrival at Southampton and being taken possession of by the defendant, so as to entitle him to treat them as the property of the vendee, and hold them in assertion of a right of lien for the general balance due to him for business done for the vendee. *Slater v. Le Feuvre*, 146.

2. The plaintiff, having purchased certain timber growing on the land of *B.*, felled it, and afterwards sold it to one *J.* at a certain price per cubic foot, *J.* to be at liberty to convert the timber on the land. The trees were marked and measured by *J.*, the number of cubic feet in each tree being ascertained, but the total contents were not summed up. Some of the trees were taken away by the purchaser:—Held, that the transfer of the whole was complete, and consequently that the vender had no right of lien for the unpaid price of the timber. *Tansley v. Turner*, 238.

SALE.

Of Goods—(Continued).

Stamp on—see STAMPS, 3.

Of Lands—see VENDOR AND PURCHASER.

Costs of Abstract—see COSTS, 4.

Crown Lands—see CROWN LANDS.

SCIRE FACIAS.

An irregularity in the proceedings upon the ca. sa. against a principal, may be taken advantage of by the bail on motion, and need not be pleaded to the sci. fa. *Goldney v. Laporte*, 670.

SET-OFF:

To a count in debt by the assignees of a bankrupt for money had and received by the defendant to the use of the plaintiffs as assignees (not stating whether received before or since the bankruptcy), the defendant pleaded a set-off for money due to him on an account stated with the bankrupt before his bankruptcy:—Held, that the plea was bad, for that it did not shew that the debts were mutual. *Groom v. Mealey*, 171.

SHERIFF.

Duties and Liabilities.

1. In an action on the case against the sheriff for taking insufficient pledges in replevin, the proper measure of damages is, the penalty of the bond, viz. double the value of the goods distrained. *Hall v. Goodricke*, 363.

And see EVIDENCE, 2—TROVER, 1.

Fees payable by the Party on Arrest.

2. The only fee allowed by law to be taken by the officer from a party arrested, is 4d., the fee prescribed by the statute 23 Hen. 6, c. 9: if he take more, he is liable to be sued for the penalty imposed for extortion by the 32 Geo. 2, c. 28. *Innes v. Levi*, 189.

Motions under the Interpleader Act—see COSTS, 7—PRACTICE, 14, 15.

Practice on Trials before—see PRACTICE, 19.

SHIP AND SHIPPING.

Liability of Part-owners for Insurance.

1. One of several part-owners of a ship, without any express authority from the others, effected a joint insurance upon the entire ship, charging the premium and commission in the ship's accounts, which were open to the inspection of and were actually inspected by the other owners, and not objected to:—Held, that the jury were warranted in finding that the managing owner had a joint authority to effect an insurance for the whole; and that, consequently, all the owners were liable to the broker, notwithstanding the credit was in the first instance given to the managing owner alone—it appearing that the broker was ignorant of the names of the other owners. *Robinson v. Gleadow*, 250.

SHIP AND SHIPPING—(Continued.)

Construction of Charterparty.

2. The plaintiff entered into a charterparty with the defendants, by which it was agreed that the ship *Jane* should receive on board a cargo and proceed therewith to Buenos Ayres and there deliver the same, and reload a cargo and proceed therewith to a port between Gibraltar and Antwerp; freight for the voyage out and home, 1300*l.* in full, if delivered at Gibraltar, a port in Spain, London, or Liverpool, and 5*l.* per cent. additional if delivered at a port in France or at Antwerp: the freight to be paid, 200*l.* in cash on the vessel being dispatched from Portsmouth, cash for the necessary expenses of the vessel in the river Plata to be advanced there, and the remainder in cash on the final delivery of the homeward cargo. The vessel proceeded to Buenos Ayres, and there took on board a quantity of hides under a bill of lading by which they were to be delivered at Gibraltar to E. & Co., they paying freight for the same at the rate of 4*l.* 10*s.* per ton. The 200*l.* were paid on the vessel leaving Portsmouth, and 66*l.* 3*s.* 11*d.* were advanced by the freighters to the master at Buenos Ayres. The *Jane* sailed for Gibraltar, and put into Fayal in distress. The cargo was there landed, and the ship condemned as unseaworthy, and sold. About one third of the hides, being damaged, were there also sold. The master sailed to England with the proceeds of the hides so sold, leaving instructions with the British vice-consul to forward the remainder to Gibraltar by the earliest opportunity. After the departure of the master, the vice-consul entered into a charterparty, on behalf of the owners of the hides, for their conveyance to Gibraltar by the *Flora* for a freight of 360*l.*, with 5*l.* per cent. primage. The hides shipped on board the *Flora* under this charterparty were duly delivered to E. & Co. at Gibraltar, and they paid the freight and primage according to the bill of lading:—Held—first, that the plaintiff was not entitled to recover the full freight agreed to be paid by the charterparty; the voyage thereby prescribed never having been performed—Secondly, that he was not entitled to freight *pro rata itineris* for the outward voyage from Portsmouth to Buenos Ayres, or for the voyage from Fayal to Gibraltar—Thirdly, that he was entitled to freight *pro rata* for the conveyance from Buenos Ayres to Fayal of that portion of the cargo which came to the freighters' hands, and was accepted by them, his claim resting upon an implied contract to remunerate him for service performed, not according to the agreement, but a service from which the freighters had received a benefit. *Mitchell v. Darthez*, 771.

SLANDER.

1. In an action for slander, imputing to the plaintiff that he, whilst churchwarden, stole the parish bell-ropes:—Held, that, inasmuch as an indictment for larceny could not be supported against a churchwarden for stealing the bell-ropes of the parish of which he is churchwarden, he having

SLANDER—(Continued.)

as such the possession of the goods of the church, the action was not maintainable. *Jackson v. Adams*, 599.

2. But, as the second count of the declaration did not import on the face of it that the plaintiff stole the bell-ropes of the church whereof he was warden, but generally that he stole bell-ropes—The court refused to arrest the judgment. *Id.*

3. The second count contained an averment by way of innuendo, "that the plaintiff, whilst in his said office of churchwarden, had been guilty of stealing ropes, and that the subjects of our lord the king then understood that that was the meaning of the said words:"—Held, that the word "stealing" could not by any reasonable intendment have any other meaning than that of the commission of the offence of larceny; and therefore that the innuendo was negatived by the plaintiff's own evidence that the defendant had intended to impute to the plaintiff that he had defrauded the parish on the sale of the bell-ropes. *Id.*

4. In an action of slander, words spoken by the defendant in relation to the same transaction, on a *former* occasion, are receivable in evidence to shew the animus. *Id.*

5. In an action of slander, a plea stating that the words were spoken in the course of a confidential communication to a person who had made inquiries respecting the solvency of the plaintiff, and that at the time of speaking the words the defendant believed them to be true—is bad on demurrer: it should either expressly negative malice, or state the communication to have been made honestly and bona fide, which would probably amount to an implied denial of malice. *Smith v. Thomas*, 546.

6. A plea negating the special damage alleged in the declaration, in slander for words actionable per se, is bad on demurrer. *Id.*

7. In an action of slander, the existence of express malice is only a matter for inquiry where the words complained of are spoken upon a justifiable occasion. *Hooper v. Truscott*, 672.

8. The plaintiff had lived in the employ of the defendant and his partner, linendrapers at Devonport, and had left them with a written character in which he was described by the defendant as "steady, honest, and industrious." Shortly afterwards some goods that had been stolen from the defendant's shop were found in the possession of a female servant (a person of notoriously bad character), which she stated to have been given to her by the plaintiff. The defendant thereupon went to the house of the plaintiff's uncle in the neighbourhood of Devonport, and there saw the plaintiff's cousin, and in the course of conversation with her said of the plaintiff—"He has stolen my goods: he has taken our goods, and given them away: we always suspected him of dishonesty." These words were afterwards repeated in the presence of the uncle. A letter was despatched by the defendant to the plaintiff in London, desiring him to go down to Devonport to meet the charge: but in the meantime the plaintiff's brother had been prevailed upon to settle the affair by giving the defendant 50*l.*;

SLANDER—(Continued.)

and, when the plaintiff arrived in Devonport, the defendant declined to press the charge:—Held, that the communication to the plaintiff's cousin at all events was unjustifiable; and that the whole course of the defendant's conduct was so irreconcilable with an intention *bona fide* to institute a legal investigation, as to dispense with the necessity for the plaintiff's proving express malice; and consequently that the question of malice ought not to have been left to the jury. *Id.*

SPECIAL DAMAGE—see **SLANDER**, 6—**TROVER**, 2.

SPECIAL VERDICT—see **COSTS**, 3—**WRIT OF RIGHT**, 11.

STAMPS.*On Agreements.*

1. One D., being the holder of several bills of exchange, and being indebted to the plaintiff, and also to R. & G., the plaintiff's agents, addressed to the latter as such agents a letter wherein he proposed to hand over to them certain of these bills on receiving from them bills of lading for a cargo of wheat shipped on his order and for his account by the plaintiff. R. & G. received two of the bills of exchange, and wrote a letter to D., varying the terms of his proposal, and consenting to receive the bills generally on account, when cashed. The first letter was stamped with a 1*l.* stamp; the second was not stamped—Held, that the first letter was the only evidence of the contract upon which the bills were delivered to R. & G., and therefore properly stamped. *Schultz v. Astley*, 815.

2. Quære whether an agreement consisting of a series of letters, the whole containing less than 1080 words, requires a 1*l.* 15*s.* stamp. *Id.*

On the Sale of Goods.

3. A. having purchased a horse valued at 34*l.*, it was agreed between him and B. that the latter should have half at 17*l.*:—Held, that this was an agreement for the sale of "goods, wares, or merchandizes," within the exception in the stamp act 55 Geo. 3, c. 184, and was consequently receivable in evidence without a stamp, notwithstanding the introduction of collateral matter. *Marson v. Short*, 243.

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SURETY—see ANNUITY, 3—TAXES, 3, 4.

TAXES.

1. By the statute 43 Geo. 3, c. 99, s. 13, the district collectors of assessed taxes are required to give security to *any two or more of the commissioners of taxes*, for their duly paying such monies as shall come to their hands: and by 3 Geo. 4, c. 88, s. 2, reg. 1, art. 8, it is provided that "all bonds, contracts, and securities to be entered into with or taken from the receivers-general to be appointed, *or with or from any other person or persons to be appointed under that act*, and their respective sureties, to remit the monies arising by the taxes granted by the said acts (the acts relating to the assessed taxes), or any of them, or any other duties or sums of money under the management of the commissioners for the affairs of taxes, shall be to *his majesty, his heirs, and successors*:"—Held, that a bond given by a collector and his sureties under the former act, was properly given to the commissioners; and that the bond was good notwithstanding it was conditioned to pay the monies collected to the receiver-general, and also to the commissioners, though by the 43 Geo. 3, c. 99, and the 3 Geo. 4, c. 88, the collectors are required to pay over such monies to the receiver-general only. *Gwynne v. Burnell*, 16.

2. Held also, that payment by the collector to the receiver-general of monies received by him to the account of a different year from that for the service of which they were collected (in order to make up deficiencies in a preceding year's account), was a breach of the condition of the bond for *duly* paying over the sums collected. *Id.*

TAXES—(Continued.)

3. The 13th section of the 43 Geo. 3, c. 99, contains a proviso "that no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector or collectors, in pursuance and by virtue of the directions and powers given to the respective commissioners by the act:"—Held (on error in the Exchequer Chamber), that the sale of the lands and goods of the collector was a condition precedent to the commencement of an action against the surety on the bond—Lord Abinger, and Park, B., dissenting. *Id.*

4. Held also, that, to make such sale a condition precedent, the surety is bound to aver and to prove notice to the commissioners, or at all events knowledge in them, of the existence of the lands and goods—Lord Denman, and Williams, J., dissenting. *Id.*

5. The bond was conditioned for payment to the receiver-general of the sums collected upon the days and at the times appointed by the acts. No times are in fact appointed by the acts; but the receiver-general is empowered to appoint the times. There was no averment in the pleadings that any times were appointed: but, the defendant having pleaded general performance, and one of the breaches in the replication being that the collector did not pay to the receiver-general the monies collected at the times by the acts appointed, on which there was a special finding that he did:—Held, that it must be presumed that the receiver-general had appointed some times of payment. *Id.*

6. Quære whether the commissioners could sell the collector's goods after judgment and satisfaction against the surety. Per Patteson, J., 35.

7. As against the collector, it is optional with the commissioners to seize and sell his goods, &c., or proceed upon the bond. Per Patteson, J., 35; and per Bolland, B., 51.

TENDER—see PAYMENT OF MONEY INTO COURT.

TITHES.

Effect of Nonpayment.

1. The mere non-payment of tithes is not a sufficient answer to a claim of tithes made by a lay impropiator. *Andrews v. Drever*, 1.

How conveyed.

2. One W. G., being seised in fee of lands, purchased the tithes thereof, and, by a settlement made on the marriage of his son, conveyed to trustees for the use of the son for life, remainder to the son's wife, in bar of dower, the lands, "together with all houses, out-houses, &c., profits, commodities, advantages, emoluments, *hereditaments*, and *appurtenances* whatsoever, to the said premises belonging or in anywise appertaining; and the reversion, &c., and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim, and demand whatsoever, either at law or in equity, of him W. G., therein or thereto, or to any

TITHES.

How conveyed—(Continued.)

part or parcel thereof—Held, that, under this conveyance, the tithes did not pass. Chapman v. Gatecombe, 788.

TITLE.

Investigation of—see Costs, 4.

TRESPASS.

In trespass for breaking and entering the plaintiff's close, the defendant pleaded that the close was not the close of the plaintiff. Held, that evidence of possession was sufficient to entitle the plaintiff to verdict. Heath v. Milward, 1160.

TROVER.

1. Certain wine warrants coming to the possession of the defendant as the personal representative of her deceased husband, who died testate, she placed them in the hands of her attorney; the warrants being demanded on behalf of the assignees of the husband; the defendant referred the applicant to the attorney:—*Held, that this was not sufficient evidence of a conversion. Cart v. Hughes, 663.*

2. In trover by assignees of a bankrupt against the sheriff for taking under a fi. fa. goods of the bankrupt after an act of bankruptcy committed, it appeared, that, in consequence of the sheriff's possession, the goods became liable to the landlord for a quarter's rent of the bankrupt's premises, and charges were incurred for a messenger that otherwise would not have been necessary; and that the goods had, after the commencement of the action, been delivered up to, and unconditionally accepted by, the plaintiffs in a perfectly undeteriorated condition:—*Held, that the plaintiffs were not entitled to recover the rent and charges so incurred, by way of special damage; there being no averment of special damage in the declaration. Moon v. Raphael, 489.*

3. Quere, whether such rent and charges were so necessary a consequence of the wrongful conversion as to entitle the plaintiff to recover them in trover, even with an averment of special damage. *Id.*

USE AND OCCUPATION—see LANDLORD AND TENANT, 1, 2, 3.

VENDOR AND PURCHASER.

Incumbrate Contract.

One G. was let into possession of land allotted to one P. under an inclosure act in 1814, upon a contract of sale under which one half of the purchase money was paid, and interest upon the remaining moiety regularly till the year 1828, when G. became bankrupt. No conveyance was ever executed, nor was the remainder of the purchase money ever paid:—*Held, that the possession by G. under this incumbrate contract was not adverse to the title of P., the vendor; and that the assignee of P. might maintain ejectment, notwithstanding the lapse*

VENDOR AND PURCHASER.

Inchoate Contract—(Continued.)

of twenty years from the time possession was first given: *Doe d. Milburn v. Edgar*, 732.

And see CROWN LANDS.

VENUE—see LOCAL ACTION.

WAGER.

"Agreed to sell my horse P. to J. B. for 200*l.* provided he trots eighteen miles within one hour, and that to be done within one month from this day, and N. to be the judge of the performance; if the above task is not performed, the horse is hereby sold to the said J. B. for one shilling, which he has this day paid to me:"—Held an illegal wager within the 9 Anne, c. 14. *Brogden v. Marriott*, 712.

WILL—see DEVISE.

WITNESS.

Attachment for obstructing Service of a Subpoena.

A defendant who keeps out of the way a witness material to the plaintiff, and thereby impedes the service of a subpoena, is liable to an attachment. *Clements v. Williams*, 814.

WOODS AND FORESTS.

Commissioners of—see CROWN LANDS.

WRIT OF RIGHT.

Writ of Summons.

1. In a writ of right, the summons for the knights to elect the assize was tested on the 10th April, returnable on the 20th. After the delivery of the writ of summons to the sheriff, *but before the knights had been actually summoned*, the demandant's attorney, finding that the 20th April was not a juridical day (it being one of the Easter holidays), and that there were not fifteen days between the teste and return of the writ of summons, got it back from the sheriff, altered the return to the 24th April, and procured it to be resealed, and gave notice to the tenant's attorney that the knights were summoned for the 24th:—Held, no ground for setting aside the writ of summons, *Miller, dem., Miller, ten.*, 116.

2. A writ of right was sued out before the 31st December, 1834, and afterwards resealed and altered in the returns at various times, and ultimately made returnable on the 21st November, 1835, the last re-sealing being long subsequent to the latest period allowed by the 3 & 6 Will. 4, c. 27, ss. 36, 37, for bringing writs of right:—This court set aside the service of the writ of summons. *Leigh, dem., Leigh, ten.*, 666.

And see pl. 8.

Grand Cape.

3. The original writ having been superseded in Chancery, this court afterwards set aside the grand cape issued pending the proceedings in equity, but without costs. *Foot, dem., Shirreff, def.*, 813.

WRIT OF RIGHT.

Judgment of Nonpros.

4. The tenant in a writ of right not being able to discover who the demandant was, obtained a judge's order directing the demandant's attorney to deliver to the tenant's attorney, within four days, the true name and address of his client. The court refused to allow the tenant to sign judgment of nonpros for disobedience of this order. *Dumday, dem., Hughes, ten., 377.*

5. Semble, that the proper course would be to make the order a rule of court, and apply for an attachment against the attorney. *Id.*

Judgment as in Case of a Nonsuit.

6. The court permitted the tenant in a writ of right to enter up judgment as in case of a nonsuit, the demandant having failed to proceed to trial pursuant to notice. *Mason, dem., Sadler, ten., 510.*

Amendment in.

7. In a writ of right, the tenant demurred to the count for a supposed deficiency in the statement of the descent. After argument, the court permitted him to withdraw his demurrer and plead de novo. *Twining, dem., Lowndes, ten., 260.*

Motion to set aside the Writ for Irregularity.

8. The court refused to re-open a rule for setting aside the service of a writ of summons on the ground that the original writ had been improperly altered and resealed, upon an affidavit that the demandant's attorney had been informed by the cursitor that it had been the invariable and immemorial practice in his office to re-seal writs when presented for that purpose within four terms of the teste. *Leigh, dem., Leigh, ten., 668.*

9. This court has no authority to set aside a writ of right: nor can it take cognizance of any of the proceedings under it until the original writ has been returned. *Foot, dem., Shirreff, def., 806.*

Tender of the Demi-mark.

10. On the trial of a writ of right, the demi-mark was tendered after the knights and several of the recognitors were sworn:—Held, in time. *Davies, dem., Lowndes, ten., 74.*

Special Verdict.

11. There cannot be a special verdict in a writ of right. *Davies, dem., Lowndes, ten., 104.*

WRIT OF SUMMONS—see WRIT OF RIGHT, 1, 2, 8.

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